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CHARLES ELMORE

In the
Supreme Court of the United States

October Term, 1935

In Equity

No. 10, ORIGINAL

THE STATE OF WYOMING, *Complainant,*
vs.
THE STATE OF COLORADO, *Defendant.*

MOTION FOR LEAVE TO FILE PETITION FOR RULE TO SHOW CAUSE AND PETITION FOR RULE TO SHOW CAUSE

EWING T. KERR
Attorney General of the State of Wyoming.
HAROLD I. BACHELLER
Deputy Attorney General.
ARTHUR KLINE
Assistant Attorney General.
Solicitors for Complainant, the State of Wyoming.

JAMES A. GREENWOOD
Cheyenne, Wyoming
W. J. WEHRLI
Casper, Wyoming
Of Counsel.

WYOMING LABOR JOURNAL, CHEYENNE

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THE STATE OF WYOMING,)
Complainant,)
vs.)
THE STATE OF COLORADO,)
Defendant.)

MOTION FOR LEAVE TO FILE PETITION FOR RULE TO SHOW CAUSE AND PETITION FOR RULE TO SHOW CAUSE

To the Honorable, the Chief Justice, and Associate Justices of the Supreme Court of the United States:

The State of Wyoming, one of the states of the Union of the United States of America, appearing in her sovereign capacity by Ewing T. Kerr, her Attorney General, upon direction of the Honorable Nels H. Smith, her Governor, and the Honorable L. C. Bishop, State Engineer of the State of Wyoming and her Commissioner charged with authority in relation to interstate streams, respectfully moves this Honorable Court for leave to file in this Court and in this cause, the same being in Equity No. 10,

Original, her petition for rule to show cause, which said petition is presented herewith.

Complainant respectfully shows unto this Court that said petition, on its face, shows that the said defendant, her officers, agents, servants, representatives and other citizens, residents and corporations, is intentionally and wilfully violating complainant's rights and the rights of complainant's water users of the State of Wyoming to appropriate and use water from the Laramie River, a non-navigable interstate stream flowing through the territory of the said defendant and the said complainant, as fixed and determined by this Honorable Court on the first day of June, A. D. 1936. (See The State of Wyoming v. The State of Colorado, 298 U. S. 753, 80 Law. Ed. 1339).

Complainant further shows, by her said petition for rule to show cause, that the said defendant is violating the decree of this Court made and entered herein as aforesaid in that said defendant and her water users in the State of Colorado have taken and appropriated water from said Laramie River in excess of 39,750 acre feet, the same being the maximum amount of water allocated to the said defendant and her water users by this Honorable Court.

That as of the date hereof, the said defendant has taken and diverted from the said Laramie River in Colorado 12,673 acre feet in excess of the amount to which the said State of Colorado is lawfully entitled, resulting in material and substantial injury to your complainant and her water users in Wyoming and depriving said complainant and her water users of the use, during the present growing season, of the necessary water for irrigation of crops, and said water could not be obtained from any other source, all of which was and is well known to the defendant.

WHEREFORE, the State of Wyoming prays leave to file her petition for rule to show cause as above stated.

Respectfully submitted,

EWING T. KERR
Attorney General of the
State of Wyoming.

HAROLD I. BACHELLER
Deputy Attorney General.

ARTHUR KLINE
Assistant Attorney General.
Solicitors for Complainant.

JAMES A. GREENWOOD

W. J. WEHRLI
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THE STATE OF WYOMING,)
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vs.)
THE STATE OF COLORADO,)
Defendant.)

PETITION FOR RULE TO SHOW CAUSE.

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

The State of Wyoming, by Ewing T. Kerr, Attorney General of the State, under the direction of the Honorable Nels H. Smith, Governor of the State, and in compliance with the request of the Honorable L. C. Bishop, State Engineer of the State and her Commissioner charged with authority in relation to interstate streams, by leave of this Honorable Court first had and obtained, bring this petition for rule to show cause, in her own behalf and that of her officials, agents, servants, and other citizens, residents and corporations, against The State of Colorado in her behalf and that of her officials, agents, servants, representatives and other citizens, residents and corporations, and respectfully sets forth and alleges as grounds for a rule

to show cause against the defendant, her officials, agents, servants, representatives and other citizens, residents and corporations, why the said defendant, her officials, agents, servants, representatives and other citizens, residents and corporations should not be adjudged in contempt of this Honorable Court for their failure and refusal to obey and comply with the opinion and decree of this Honorable Court rendered and entered June 1, A. D. 1936.

FIRST.

That your complainant is one of the states of the United States entitled to enjoy all privileges, rights and powers, and with all the duties, including the duty of protecting the rights, interests and property of her citizens and residents possessed or devolved upon each and all of said states of the United States of America.

SECOND.

That The State of Colorado is likewise one of the states constituting the United States of America entitled to enjoy all the privileges, rights and powers, and with all the duties, including the duty of protecting the rights, interests and property of its citizens and residents possessed and devolving upon each and all of said states of the United States of America.

THIRD.

That heretofore and on the first day of June, A. D. 1936, this Honorable Court rendered its opinion and entered its decree thereon in the case of The State of Wyoming vs. The State of Colorado, 298 U. S. 573; 80 Law. Ed. 1339; that under said opinion and decree, as aforesaid, this Honorable Court confirmed and established the right of The

State of Colorado, or of any one recognized by her as duly entitled thereto, to divert and take within that State

(1) 18,000 acre feet of water per annum from the Laramie River and its tributaries in virtue of the Skyline Ditch appropriation;

(2) 4,250 acre feet of water per annum from such stream and its tributaries in virtue of certain meadowland appropriations;

(3) 2,000 acre feet per annum, the amount of the recognized appropriations, through the Wilson Supply Ditch, from the headwaters of Deadman Creek;

(4) 15,500 acre feet of water per annum from the Laramie River and its tributaries in virtue of the Laramie-Poudre Tunnel appropriation;

and said opinion and decree, as aforesaid, confirmed and established the right of The State of Wyoming and her water claimants to receive and divert within the State the remaining water of the stream and its tributaries.

FOURTH.

Reference is hereby made to the amended original bill and exhibits filed, the answer of the defendant, the testimony taken on both sides, the final decree in the cause, and each and every other paper and proceeding in this cause from the institution of the suit to the filing of this petition, and it is prayed that the same may be taken and read as a part thereof at any time and on hearings on this petition.

FIFTH.

That from on or about the first day of May, A. D. 1939, to and including the eighteenth day of June, A. D. 1939, the said defendant, The State of Colorado, her officers, agents, servants, representatives and other citizens, resi-

dents and corporations, had diverted and taken from the Laramie River the following quantities of water:

Through the Skyline Ditch 9,013 acre feet

Through the Laramie-Poudre Tunnel 7,458 acre feet

Through the Wilson Supply Ditch 872 acre feet

Through the Meadowland appropriations 22,526.43 acre feet, or a total of 39,865.43 acre feet.

SIXTH.

That thereafter and on the nineteenth day of June, A. D. 1939, the said defendant, through her duly authorized officers, agents, servants, representatives and other citizens, residents and corporations, closed the headgates of the Skyline Ditch, Meadowland appropriations, Wilson Supply Ditch and the Laramie-Poudre Tunnel, and posted, or caused to be posted, upon said headgates a notice in the following form:

"Notice.

"..... Ditch

"This headgate has been closed by me this..... day of....., A. D. 19....., in accordance with provisions of a decree of the U. S. Supreme Court in Wyo. v. Colo.; and in accordance with decree of the District Court of Colorado, Larimer Co., Cause No. 7897 entered on the 2nd day of February, A. D. 1939.

"Further diversions of this ditch during the current year are enjoined by Court decree.

(signed) R. A. Mosier
Water Commissioner, Dist. No. 48."

That each of said notices contained thereon, in the blank

space provided, the name of the particular diversion and the date of the posting of said notice.

SEVENTH.

That thereafter and on the twenty-second day of June, A. D. 1939, the said defendant, in disregard and violation of the opinion and decree of this Honorable Court rendered on June 1, A. D. 1936, opened and permitted water to be diverted through the said Skyline Ditch, Meadowland appropriations, Wilson Supply Ditch and the Laramie-Poudre Tunnel in amounts greatly in excess of the total allocation of 39,750 acre feet.

That from the said twenty-second day of June, A. D. 1939, to and including the eleventh day of July, A. D. 1939, there was taken and diverted through the said diversions the following quantities of water:

Through the Skyline Ditch 3,644 acre feet

Through the Laramie-Poudre Tunnel 2,530 acre feet

Through the Meadowland appropriations 6,499 acre feet, or a total of 12,673 acre feet, said 12,673 acre feet being in excess of the 39,750 acre feet heretofore allocated to The State of Colorado by this Honorable Court.

EIGHTH.

That this Honorable Court, by its decree and injunctional order of June 1, A. D. 1936, (see 298 U. S. 573; 80 Law. Ed. 1339) enjoined the said defendant, her officers, agents and servants and her water claimants from diverting or taking from the Laramie River and its tributaries in The State of Colorado for meadowland appropriations more than 4,250 acre feet of water per annum and the said defendant, The State of Colorado, her officers, agents and representatives, had at all times since June 1, A. D. 1936,

knowledge of the issuance thereof; that a true and correct copy of said decree, marked Exhibit "A", is attached hereto and by this reference expressly made a part hereof.

NINTH.

That the said defendant, The State of Colorado, her officers, agents and servants, and her water claimants, has intentionally disobeyed said injunctional order and decree and, in contempt of this Honorable Court the said defendant, her officers, agents and servants, and her water claimants, from on or about the first day of May, A. D. 1939, to and including the eleventh day of July, A. D. 1939, has diverted, taken and permitted the diversion and taking through the headgates of said Meadowland ditches, from the natural channel of the said Laramie River in The State of Colorado, 24,775 acre feet of water over and above the 4,250 acre feet of water awarded and set over unto said Meadowland diversions under the decree of this Honorable Court of June 1, A. D. 1936.

TENTH.

That the disobedience of said decree and injunctional order of this Honorable Court has resulted in a material and substantial injury to your complainant in that it, the said complainant, has been deprived of the use of said water during the present growing season, which needed water could not be obtained from any other source, all of which was likewise well known to the defendant, The State of Colorado, and her officers, agents and servants and her water claimants.

ELEVENTH.

That the said defendant, her officers, agents and servants, and her water claimants, were duly notified by the com-

plainant that water was being diverted from the said Laramie River in The State of Colorado in excess of 39,750 acre feet, and the said defendant, her officers, agents and servants, and her water claimants, were requested by the said complainant to forthwith close the headgates of the several diversions and cease appropriating said water.

TWELFTH.

That on or about the first day of July, A. D. 1939, at the request of the complainant, officials of the said complainant, charged with the supervision of the waters of The State of Wyoming and of their appropriation, diversion and distribution, and the Attorney General of The State of Wyoming, conferred with like officials and the Attorney General of The State of Colorado in the City of Denver, State of Colorado; that at said conference protests were made by the complainant's officials against the excessive diversions hereinabove alleged and set out, and the said officials of the defendant, while admitting that the said defendant, her officers, agents and servants, and her water claimants, had appropriated water from said Laramie River in excess of 39,750 acre feet, refused to close said headgates and cease said diversions.

THIRTEENTH.

That subsequent to said conference, and to-wit, on the seventh day of July, A. D. 1939, the said complainant again formally protested in writing to the said defendant concerning said excessive diversions and requested and demanded in said written protest that the said defendant take steps to prevent said excessive diversions; that attached hereto, and marked Exhibit "B", is a true and correct copy of said written protest of July 7, A. D. 1939;

that set forth in said complainant's Exhibit "B" is a true and correct copy of a former protest made upon the said defendant by the said complainant by telegram under date of June 29, A. D. 1939.

FOURTEENTH.

That the said claimant also attaches hereto and makes a part hereof complainant's Exhibits "C" and "D", being affidavits of water officials of The State of Wyoming having personal knowledge of said diversions.

FIFTEENTH.

That all of the diversions involved in this proceeding are within the borders of The State of Colorado and the officials of The State of Wyoming have no authority to exercise any jurisdiction whatsoever in regard to the same, and the said complainant has no adequate remedy, or any remedy in any court whatsoever except in the Supreme Court of the United States in respect to the matters herein alleged to prevent the said defendant, her officers, agents and servants, and her water claimants from further excessive and unlawful diversions of the waters of the said Laramie River; by reason of the said unlawful diversions by said defendant, her officers, agents and servants, and her water claimants, of water belonging to and being the property of said complainant, the said complainant and her water users have suffered and will continue to suffer substantial damage.

WHEREFORE, complainant prays that this Honorable Court issue its rule against The State of Colorado, directing The State of Colorado to appear before this Honorable Court on a day certain to be fixed by this Honorable Court and show cause, if any there be, why the said defendant

should not be adjudged in contempt and punished for violating said injunction and decree; that a fine be imposed upon said defendant, for the use of said complainant, sufficient in amount to reimburse your complainant and her water appropriators from the said Laramie River for injuries sustained by reason of the violation by the said defendant of said injunctional order and decree of June 1, A. D. 1936; that this Honorable Court forthwith take all necessary and proper steps, issue any and all needful orders, decrees or judgments to carry out and enforce the decrees of this Honorable Court in the diversions of said waters, including the appointment of some proper person or federal agency to administer said water so that the said complainant will not in the future be deprived of water to which it is lawfully entitled; that complainant be granted her costs and such other and further relief be accorded to complainant as to this Honorable Court shall appear proper in the premises.

EWING T. KERR
Attorney General of the
State of Wyoming.

HAROLD I. BACHELLER
Deputy Attorney General.

ARTHUR KLINE
Assistant Attorney General.
Solicitors for Complainant,
the State of Wyoming.

JAMES A. GREENWOOD

W. J. WEHRLI
Of Counsel.

THE STATE OF WYOMING)
)ss.
COUNTY OF LARAMIE)

EWING T. KERR, being duly sworn on his oath according to law, deposes and says: That he is the Attorney General of the State of Wyoming, and as such, at the direction and upon the request of the Governor of said State, and upon the request of the State Engineer and Commissioner for Wyoming, exhibits the foregoing petition for rule to show cause; that he has read said petition for rule to show cause and that the facts therein set forth, saving and excepting those averred on information and belief, are true; and that as to the facts therein alleged as upon information and belief, affiant is credibly informed and verily believes that said facts are true.

EWING T. KERR

Subscribed in my presence and sworn to before me this 19 day of July, A. D. 1939.

RUBY B. SALYER
Notary Public

(Notarial Seal)

My commission expires March 25, 1943.

EXHIBIT "A".

SUPREME COURT OF THE UNITED STATES

No. 10, Original, October Term, 1935.

THE STATE OF WYOMING,
Complainant,

vs.

THE STATE OF COLORADO.

(June 1, 1936.)

DECREE

This cause having been heretofore submitted on the pleadings and the evidence taken before and reported by the Commissioners appointed for the purpose, and the Court being now fully advised in the premises:

IT IS CONSIDERED, ORDERED and DECREED that The State of Colorado, her officers, agents and servants, and her water claimants, be, and they are hereby, severally enjoined from diverting or taking from the Laramie River and its tributaries in The State of Colorado more than four thousand two hundred and fifty (4,250) acre-feet of water per annum in virtue of and through the meadowland appropriations in that State which are named in the pleadings and evidence, such diversion to be measured at the headgates through which the water is diverted.

And it is also considered, ordered and decreed that The State of Wyoming be, and she is hereby, given leave to apply later on for an appropriate order respecting the measurement and recording of all diversions in The State of Colorado from the Laramie River and its tributaries in the event the two States are unable to agree upon an appropriate plan for measuring and recording such diversions and there proves to be a need for action by this Court in this matter. Jurisdiction of the cause will be retained for the purpose of such an application.

And it is further ordered and adjudged that costs in the suit be taxed one-half to each of the two States.
A true copy.
Test:

(signed) CHARLES ELMORE CROPLEY
Clerk, Supreme Court, U. S.

EXHIBIT "B".

July 7, 1939

Honorable Ralph L. Carr, Governor
of the State of Colorado
Honorable Byron G. Rogers, Attorney
General of the State of Colorado
Honorable M. C. Hinderlider, State
Engineer of the State of Colorado
Gentlemen:

On June 18, A. D. 1939, the State of Colorado had used through the Skyline Ditch, Meadowland Ditches, Laramie-Poudre Tunnel and Wilson Supply Ditch, a total of 39,750 acre feet from the Laramie River, which was the amount allocated for these ditches by an opinion and decree of the Supreme Court of the United States dated June 1, A. D. 1936.

On said June 18th, 1939, Mr. M. C. Hinderlider, State Engineer of the State of Colorado, closed, or caused to be closed, the headgates of said diversions, to-wit: Skyline Ditch, Meadowland Ditches, Laramie-Poudre Tunnel and Wilson Supply Ditch, and posted, or caused to be posted, on said headgates, and each of them, a notice in substance as follows:

"Laramie Poudre Tunnel Ditch.

Notice.

"This headgate has been closed by the Water Commissioner in accordance with the terms of the decree of the Supreme Court of the United States and the decree of the District Court of Larimer County, Colorado.

"Any further diversion through this ditch during the present irrigation season will be in contempt of said decrees.

R. A. Mosier,
Water Commissioner
District No. ....."

On the 22nd day of June, A. D. 1939, the water appropriators of Colorado, in defiance of the action of the State Engineer of the State of Colorado and in defiance of the decree of the Supreme Court of the United States dated June 1, 1936, opened the headgates to the Skyline Ditch, Meadowland Ditches, and Laramie-Poudre Tunnel.

On the 23rd day of June, A. D. 1939, I contacted Byron G. Rogers, Attorney General of the State of Colorado, and advised him that these gates were open and that the State of Wyoming insisted that said gates be closed inasmuch as Colorado has used the amount of water allocated to said State by the Supreme Court of the United States.

On the same date, to-wit: On the 23rd day of June, 1939, Mr. L. C. Bishop, State Engineer of the State of Wyoming, contacted Mr. M. C. Hinderlider, State Engineer of the State of Colorado, and made demand upon him to close all of said headgates in view of the fact that Colorado had received the total amount of water allocated to it by the Supreme Court of the United States, and on the 29th day of June, A. D. 1939, Mr. L. C. Bishop, State Engineer of the State of Wyoming, sent the following wire to the State Engineer of the State of Colorado:

"M. C. Hinderlider
State Engineer
Capitol Building
Denver, Colorado
On June 28 Laramie Poudre Tunnel was flowing 65.9 second feet, Skyline Ditch flowing 104.6 second feet. On June 27 Dead Man

Ditch flowing 3.3 second feet. Investigation disclosed all meadow land ditches were diverting. Wyoming demands that Laramie Poudre Tunnel, Skyline Ditch, Dead Man Ditch and all meadow land diversions cease forthwith. Advise immediately if this will be done. Would like to have conference with you and Attorney General Saturday morning at ten.

L. C. BISHOP,
State Engineer."

And on said 29th day of June, A. D. 1939, Mr. L. C. Bishop sent the following wire to the Attorney General of the State of Colorado:

"Honorable Byron G. Rogers
Attorney General
Capitol Building
Denver, Colorado
Have just sent the following wire to State Engineer Hinderlider quote on June 28 Laramie Poudre Tunnel was flowing 65.9 second feet, Skyline Ditch flowing 104.6 second feet. On June 27 Dead Man Ditch flowing 3.3 second feet. Investigation disclosed all meadow land ditches were diverting. Wyoming demands that Laramie Poudre Tunnel, Skyline Ditch, Dead Man Ditch and all meadow land diversions cease forthwith. Advise immediately if this will be done. Would like to have conference with you and Attorney General Saturday m o r n i n g at ten. Unquote. Earnestly request your immediate cooperation in seeing that the orders of Supreme Court of United States and the District Court of Larimer County are carried out.

L. C. BISHOP,
State Engineer."

That on said 29th day of June, A. D. 1939, Mr. M. C. Hinderlider, State Engineer of the State of Colorado, wired the State Engineer of the State of Wyoming, as follows:

"L. C. Bishop, State Engineer
State Capitol
"Re your telegrams this day to Attorney General Rogers and myself we shall be very glad to confer with you and Attorney General Kerr here at ten o'clock Saturday.

M. C. HINDERLIDER,
State Engineer."

The State Engineer of the State of Wyoming and the Attorney General of the State of Wyoming met in conference with the Governor of the State of Colorado, the Attorney General of the State of Colorado and the State Engineer of the State of Colorado, together with representatives of the water appropriators of the Skyline Ditch, the Laramie-Poudre Tunnel and the Meadowland Ditches. That at said conference the officials of the State of Wyoming were notified by the officials of the State of Colorado that they, the said officials of the State of Colorado, would not close the headgates of the Skyline Ditch, Meadowland Ditches and the Laramie-Poudre Tunnel, notwithstanding the fact that the officials of the State of Colorado admit that they had already diverted water through the Skyline Ditch, the Meadowland Ditches, The Laramie-Poudre Tunnel and the Wilson Supply Ditch equal to and in excess of 39,750 acre feet.

The drouth situation in Wyoming is acute; the water users of this State are making daily demands upon this office to institute immediate action to enforce the decree of the Supreme Court of the United States.

The Governor of the State of Wyoming and the State Engineer of the State of Wyoming have both requested that I write you and again make demand upon the

State of Colorado to comply with and obey the terms of the opinion and decree of the Supreme Court of the United States rendered June 1, A. D. 1936. In compliance with their request, the State of Wyoming again makes demand upon your State to forthwith close the said headgates inasmuch as the State of Colorado has used the total of 39,750 acre feet, said total being the amount of water allocated to the State of Colorado by said decree of the Supreme Court of the United States, and is now using water in excess of the amount allocated to them by said decree and water which is the property of the State of Wyoming.

If the State of Colorado still continues to refuse to comply with and obey said decree, the State of Wyoming will take such action as may be necessary and advisable in the premises to enforce the decree of the Supreme Court of the United States.

Yours very truly,

(signed) EWING T. KERR
Attorney General.

ETK:rs

EXHIBIT "C".

AFFIDAVIT

THE STATE OF WYOMING)
)ss.
COUNTY OF LARAMIE)

I, BEN E. Le VASSEUR, of lawful age, having been first duly sworn on oath according to law, depose and say:

That I am the duly appointed, qualified and acting hydrographer charged with the duty of measuring and reporting water diversions on the Laramie River; that I act under appointment and direct supervision of the State Engineer of the State of Wyoming and reports compiled

by me in the discharge of my duties showing in detail the water being, from time to time, taken and diverted from said Laramie River are transmitted to the office of the State Engineer of the State of Wyoming, at the Capitol Building, in the City of Cheyenne, Laramie County, Wyoming, and become a permanent record of that office.

That I entered upon my duties as said hydrographer for the irrigating season of 1939, on or about the first day of May, 1939, and continuously since said date have observed and measured the water being diverted from said Laramie River; that on the 18th day of June, 1939, the Skyline Ditch, Laramie-Poudre Tunnel, Wilson Supply Ditch and the Meadowland diversions had jointly diverted water from the Laramie River in the aggregate of 39,750 acre feet.

That on June 18th, 1939, the officials of the State of Colorado closed, or caused to be closed, all of the headgates diverting water from the above named diversions of the said Laramie River, and on each headgate a notice was posted by the said officials of the State of Colorado, similar and substantially in the following form:

Notice.

"..... DITCH

This headgate has been closed by me this..... day of....., A. D. 19....., in accordance with provisions of a decree of the U. S. Supreme Court in Wyo. vs. Colo.; and in accordance with decree of the District Court of Colorado, Larimer Co., Cause No. 7897 entered on the 2nd day of February, A. D. 1939.

Further diversions of this ditch during the current year are enjoined by Court Decree.

.....

Water Commissioner, Dist. No. 48."

That subsequently to the closing of said headgates on the said 18th day of June, 1939, and commencing on or about the 22nd day of June, 1939, the said headgates were opened by the water appropriators of the State of Colorado and said headgates have been since said date and are now diverting water from the Laramie River in excess of 39,750 acre feet.

That I made oral protest to one R. A. Mosier, Water Commissioner for the State of Colorado, against the reopening of said headgates, who stated to me in substance that he was not going to take any action looking toward the closing of said headgates as he had not received any instructions so to do from other officials of the State of Colorado.

I further state that the said Skyline Ditch, Laramie-Poudre Tunnel and Meadowland diversions have diverted water from said Laramie River from June 21, 1939 to June 30, 1939, inclusive, 6,648.3 acre feet, said amount being in excess of the 39,750 acre feet.

That on the 8th day of July, 1939, I measured water being diverted through the Laramie-Poudre Tunnel and Skyline Ditch on said Laramie River and by actual measurement said Laramie-Poudre Tunnel was diverting 51.32 second feet and the said Skyline Ditch was diverting 85.28 second feet.

Further affiant sayeth not.

BEN. E. LEVASSEUR.

Subscribed and sworn to before me this 19 day of July, A. D. 1939.

RUBY B. SALYER
Notary Public

(Seal)

My commission expires March 25, 1943.

EXHIBIT "D"

AFFIDAVIT.

THE STATE OF WYOMING)
)ss.
COUNTY OF LARAMIE)

I, EARL LLOYD, of lawful age, having been first duly sworn on oath according to law, depose and say:

That I am an engineer duly licensed to practice my profession in the State of Wyoming.

That I am the duly appointed, qualified and acting Deputy State Engineer for the State of Wyoming.

That as Deputy State Engineer for the State of Wyoming, I have custody of all records and reports of the office of State Engineer; that I have examined all reports from the hydrographer on the Laramie River, who is charged with the duty of measuring and reporting water diversions on said Laramie River; that said reports, as made by said hydrographer, are filed in the office of the State Engineer and are a permanent record of that office.

That said reports of said hydrographer show that the Skyline Ditch, Laramie-Poudre Tunnel, Wilson Supply Ditch and Meadowland diversions in the State of Colorado have all diverted from the Laramie River an aggregate total of 39,750 acre feet up to and including June 18, A. D. 1939.

That on the 28th day of June, A. D. 1939, in company with one S. S. Sharp, Water Superintendent for Water Division No. 1 of the State of Wyoming, I visited the headgates of the Skyline Ditch, Laramie-Poudre Tunnel and the diversions of the Meadowlands; that on said day, I personally observed that the headgates of the Skyline Ditch,

Laramie-Poudre Tunnel and the Meadowland diverisons were open and water was being diverted from the Laramie River through said headgates, and each of them, and I further observed upon said headgates a notice which was in substantially the following form:

"Notice.

"..... Ditch

"This headgate has been closed by me this..... day of....., A. D. 19....., in accordance with provisions of a decree of the U. S. Supreme Court in Wyo. v. Colo.; and in accordance with decree of the District Court of Colorado, Larimer Co., Cause No. 7897 entered on the 2nd day of February, A. D. 1939.

"Further diversions of this ditch during the current year are enjoined by Court decree.

(signed) R. A. Mosier,
Water Commissioner, Dist.
No. 48."

That each of said notices contained thereon, in the blank space provided, the name of the particular diversion and the date of the posting of said notice.

That the original reports in our office received from the hydrographer on the Laramie River disclose that the said headgates of the Skyline Ditch, Laramie-Poudre Tunnel and the Meadowland diversions have been open since the 22nd day of June, A. D. 1939, and they, and each of them, have been diverting water in excess of the aggregate total of 39,750 acre feet.

That from on or about the 1st day of May, A. D. 1939, to and including the 12th day of July, A. D. 1939, the Meadowland appropriators had taken and diverted from the Laramie River in the State of Colorado a total of 29,025 acre feet.

That since the 22nd day of June, A. D. 1939, to and including the 12th day of July, A. D. 1939, the State of Colorado has taken and diverted through the Skyline Ditch 3,644 acre feet, through the Laramie-Poudre Tunnel 2,530 acre feet and through the Meadowland diversions 6,499 acre feet, or a total of 12,673 acre feet in excess of the 39,750 acre feet; that said State of Colorado has, since the 12th day of July, A. D. 1939, and is now taking and diverting water from the said Laramie River in the State of Colorado.

Further affiant sayeth not.

EARL LLOYD

Subscribed and sworn to before me this 19 day of July, 1939.

RUBY B. SALYER
Notary Public

(Seal)

My commission expires March 25, 1943.

THE STATE OF COLORADO)
)ss.
City and County of Denver)

Service of a copy of the petition for rule to show cause in the case of The State of Wyoming vs. The State of Colorado, Original No. 10, is hereby acknowledged to have been received by me this 19 day of July, A. D. 1939.

BYRON G. ROGERS
Attorney General of Colorado
and Solicitor for Defendant.

FILE COPY

IN THE

Supreme Court of the United States

October Term, 1935

IN EQUITY.

No. 10, Original.

THE STATE OF WYOMING, *Complainant,*

vs.

THE STATE OF COLORADO, *Defendant.*

RETURN OF THE DEFENDANT THE STATE OF COLORADO TO THE RULE TO SHOW CAUSE.

BYRON G. ROGERS,
Attorney General,
HENRY E. LUTZ,
Deputy Attorney General,
SHRADER P. HOWELL,
Assistant Attorney General,
Attorneys for the Defendant State of Colorado.

ROBERT G. SMITH,
LAWRENCE R. TEMPLE,
ALBERT P. FISCHER,
Of Counsel.

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THE STATE OF COLORADO, *Defendant.*

RETURN OF THE DEFENDANT THE STATE OF COLORADO TO THE RULE TO SHOW CAUSE.

Comes now the State of Colorado, Defendant above named, by Byron G. Rogers, its Attorney General, and in obedience to the RULE TO SHOW CAUSE heretofore herein issued as of date, March 4th, A. D. 1940, makes this its Return thereunto, and in this behalf respectfully states and shows:

I.

(1) That it admits all and singular the allegations of paragraphs numbered "First," "Second," "Third" and "Fourth" of the Petition herein.

(2) Defendant joins in the prayer found in Paragraph "Fourth" of said Petition.

(3) Defendant generally admits the allegations of Paragraph "Fifth," but respecting the alleged excessive appropriations of the so-called Meadowland appropriators, alleges and says that said appropriators purported to act under and by virtue of the authority of a decree of the District Court of Larimer County, Colorado, entered as of date February 2nd, A. D. 1939, wherein and whereby it was found and decreed that ninety per cent of said quantity of water so diverted was in truth and in fact returned to said Laramie River without prejudice to the Plaintiff or anyone else whomsoever. Copy of said mentioned decree, hereinafter more particularly referred to, is hereto attached, made a part hereof, and marked Exhibit "A."

(4) Defendant admits all and singular the allegations of Paragraph "Sixth" and further states that as soon as Defendant's state engineer and its other responsible officials for the administration of all water decrees, determined that all of the diversions and appropriations authorized and permitted by this Honorable Court had been made, they ordered closed all affected headgates, which order was immediately carried into effect.

(5) Defendant admits the allegations of Paragraph "Seventh," save that it denies that it permitted or allowed, or intended to permit or allow, any diversion soever in disregard or violation of the decree of this Honorable Court. However, after this Defendant had posted said mentioned notices and said headgates had been closed as aforesaid, some person or persons whose identity was and as yet is to this Defendant unknown, without the knowledge, consent or approval of this Defendant, caused said headgates to be reopened and some of said notices to be removed whereby a greater quantity than that specifically mentioned in the decree of this Honorable Court was diverted from said Laramie River.

(6) Defendant admits the allegations of Paragraph "Eighth" of the Petition.

(7) Defendant denies the allegations of Paragraph "Ninth" save that it admits an excessive diversion from the standpoint of strict water admeasurement, by certain of its Meadowland appropriators and claimants, during the period in said paragraph alleged, but with respect thereto further avers that said diversions by said Meadowland appropriators in excess of 4,250 acre feet headgate measurement were made pursuant to a decree of the District Court of Colorado (hereinafter more particularly referred to) wherein said Court undertook to interpret and construe the decree of this Honorable Court as having made a mass allocation of 39,750 acre feet of water annually to Colorado claimants as distinguished from individual allotments in specified amounts, the said District Court decree authorized the diversion by said Meadowland appropriators complained of in said Paragraph "Ninth" as and according to their priorities established under Colorado law, all diversions not to exceed 39,750 acre feet.

And further as this Defendant is informed and believes Complainant herein, the State of Wyoming, by and through its responsible officers did expressly consent to said Meadowland diversions of which it now complains, such consent having been given on the basis and in the belief that at least 75 per cent of said diversions to said Meadowlands did in truth and in fact return to the Laramie River and hence wholly failed to impair any rights of Wyoming or its appropriators. This Defendant further alleges Complainant was and is in accord with the said decree of the said Colorado District Court respecting its interpretation of the decree of this Court and was and is of the opinion that the apparent restriction of said Meadowlands to 4,250 acre feet annually was not a literal restriction but was only a part of a mass allocation to Colorado of 39,750 acre feet annually.

(8) Defendant denies all and singular the allegations of Paragraph "Tenth" of said Petition, and in such behalf states that by reason of the so-called return flow to said Laramie River, as herein above noted, and conceded by said

Complainant to be true, that no damage has resulted or can result to said Complainant or to any of its appropriators.

(9) With respect to the allegations of Paragraph "Eleventh," this Defendant avers that, although it admits that notice therein was given, nevertheless said Complainant did not insist upon a forthwith closing of the headgates particularly as respects the said Meadowland diversions, for the reason that it then and there conceded that such was the return flow therefrom that no damage or injury could or would ensue to said Complainant.

(10) Defendant admits so much of the allegations of Paragraph "Twelfth" as relate to excessive diversions determined by acre feet admeasurements by its Meadowland claimants, but expressly denies its own responsibility therefor or its participation therein, and denies that it refused to again close said headgates, but upon the contrary, thereupon again proceeded to close said headgates as more particularly next hereinafter alleged.

(11) Defendant admits the allegations of Paragraph "Thirteenth" and alleges that no Colorado appropriation exceeded or even equaled the amount accredited to it as a distinct appropriation with the exception of the Meadowland appropriators who assert and claim that they were assured by the legally constituted authorities of Wyoming that Complainant had no objection as to excess diversions by them, by reason of the so-called return flow thereof to the Laramie River, but that nevertheless and in response to the demand as in Paragraph "Thirteenth" alleged, this Defendant did on, to-wit, July 13th and July 14th, A. D. 1939, by and through its State Engineer and for the second time again proceed to close and did close the headgates in this cause involved and immediately thereafter said Claimants, or some of them, or some person or persons in their behalf, again reopened said headgates as was done in the first instance, all of which this Defendant had not anticipated and was then and there immediately without adequate policing facilities to prevent.

(12) This Defendant denies all of Paragraph "Fifteenth" save that portion thereof stating that all of the diversions herein involved are within the State of Colorado and that Complainant is without jurisdiction in regard thereto.

II.

(1) And for further Return to the Rule, this Defendant expressly alleges that neither it nor any of its agents has knowingly, wilfully, or intentionally, or at all, violated the decree of this Honorable Court heretofore herein entered, and earnestly disclaims any contumacy so ever; further that any excessive diversions by its claimants were without its knowledge in the first instance or consent or approval thereof thereafter, and this Defendant assures this Honorable Court that it is not only eager itself to strictly abide but to cause all of its water claimants to strictly abide the decree of this Court, and will cause them so to do.

(2) For the further information and consideration of this Honorable Court, it is respectfully advised, that heretofore and on or about the 24th day of September, A. D. 1938, there was instituted in the District Court of the County of Larimer in the State of Colorado that certain cause numbered 7897 in the dockets thereof and entitled as follows:

Adelrick Benzinger,

Plaintiff,

vs.

The Water Supply & Storage Company, a corporation, The Tunnel Water Company, a corporation, The Divide Canal & Reservoir Company, a corporation, M. C. Hinderlider as State Engineer of the State of Colorado, and R. A. Mosier, as Commissioner of Water District No. 48,

Defendants.

Wherein and whereby the Plaintiff in said suit sought an injunction against the several Defendants therein named upon the grounds therein stated and for a declaratory judgment respecting the several rights of the parties. That said suit to a very considerable extent involved the construction and interpretation of the decree of this Honorable Court and the proceedings herein.

It was further alleged in said suit that the Defendants therein and each of them interpreted the decree of this Honorable Court as having made specific allotments to said defendant corporations, and that said interpretation was at contrariety with and interfered with specific appropriations long prior thereto made in conformity with apt laws of the State of Colorado.

After trial and hearing had of said cause, the said Court did on the 21st day of February, 1939, enter its decree and declaratory judgment, a true copy whereof is hereto attached and marked as hereinbefore alleged as Exhibit "A."

It will be noted therefrom that the said District Court of the State of Colorado specifically found that approximately ninety per cent of the water applied to the irrigation of the said Meadowlands returned to the Laramie River through percolation and surface flow and that in consequence only approximately ten per cent of all the water diverted for said Meadowland appropriations was actually consumed thereby.

The attention of the Court is called particularly to Paragraph VII of said decree of said District Court of Colorado wherein it is stated and found that the opinion and decree of this, the Supreme Court of the United States, has created uncertainties and given rise to controversies between many of the Colorado appropriators; that the decree of this Court if it made specific allocations of water therein runs counter, if given full effect, to the

water right laws of Colorado covering priorities of appropriations, and it is said in Paragraph IX of said Colorado decree that it was not the purpose of the suit between Wyoming and Colorado to withdraw local appropriations and water claims from the operation of the laws of the State, and the Court thereupon went on to adjudicate the respective priorities of the several claimants upon the theory that no specific allotments were made by this Court, but upon the contrary, there was a mass allocation of 39,750 acre feet to Colorado claimants.

WHEREFORE, the consideration of this Court is earnestly invited to the difficulties attending the administration of the waters of the Laramie River; the conflicting views obtaining among the water claimants as to whether there was under the decree and opinion of this Court individual allotments of water to such claimants or a mass allocation of water to the State of Colorado for administration under its laws; the decree of the District Court of Colorado to such effect, the rejection by this Court of the doctrine of return flow notwithstanding the allegation in Wyoming's original bill (page 7, Volume I, Transcript of Record) that approximately seventy-five per cent of the Meodowland appropriations return to the Laramie River; and the findings of fact by the Colorado District Court that ninety per cent of said Meadowland diversions were in truth returned to the river for Wyoming's use; the wide conflict of interest as respects the individual appropriators according to the interpretation of the decree of this Court, such as, if 4,250 acre feet headgate measurement is to be literally applied, the Meadowlands will be to all intents and purposes destroyed. If greater diversions for the Meadowlands are allowed, as provided in the decree of the Colorado District Court and the return flow doctrine is still to be rejected by this Court, then no other claimant provided for in the decrees of this Court will ever receive to exceed one-half of the amounts awarded them.

The clarification by this Honorable Court of its decree will solve all controversies attending this cause and such is earnestly and respectfully prayed.

And this Defendant respectfully submits the violations of the decree of this Court respecting said Meadowlands were technical, as distinguished from prejudicial, and the violation of said decree as respects the limitation thereof was had and done as hereinbefore alleged under said Colorado Court's decree and with the full knowledge and consent of Wyoming.

There are hereto attached and marked as Exhibits "B," "C," "D," "E," and "F," the affidavits respectively of Robert G. Smith, Fancher Sarchet, Albert P. Fischer, Lawrence R. Temple, and M. C. Hinderlider, State Engineer of Colorado, respecting said Meadowland diversions, and the consent of Wyoming thereto.

WHEREFORE, it is respectfully prayed that the prayer of the Petition be in all things denied; that this Defendant be discharged from the Rule hereinbefore herein issued, and for such other relief as the facts warrant.

BYRON G. ROGERS,
Attorney General,
HENRY E. LUTZ,
Deputy Attorney General,
SHRADER P. HOWELL,
Assistant Attorney General,
Attorneys for the Defendant
State of Colorado.

ROBERT G. SMITH,
LAWRENCE R. TEMPLE,
ALBERT P. FISCHER,
Of Counsel.

STATE OF COLORADO, }
CITY AND COUNTY OF DENVER } ss.

BYRON G. ROGERS, of lawful age, first duly sworn on his oath deposes and says that he is the duly elected, qualified and acting Attorney General of the State of Colorado; that he has read the above and foregoing Return to the Rule to Show Cause, knows the contents thereof, and that the same is true according to the best of his knowledge, information and belief.

BYRON G. ROGERS.

Subscribed and sworn to before me this 18th day of March, A. D. 1940.

My commission expires July 6, 1942.

ANN G. LANDY,
Notary Public.

(Seal)

EXHIBIT "A."

STATE OF COLORADO, }
County of Larimer } ss.

IN THE DISTRICT COURT.
No. 7897.

ADELRICK BENZIGER,
Plaintiff,
vs.
THE WATER SUPPLY & STORAGE COMPANY, a corporation, THE TUNNEL WATER COMPANY, a corporation, THE DIVIDE CANAL & RESERVOIR COMPANY, a corporation, M. C. HINDERLIDER as State Engineer of the State of Colorado, and R. A. MOSIER, as Commissioner of Water District No. 48,
Defendants.

DECLARATORY JUDGMENT AND DECREE.

This cause having come on for trial to the Court on Tuesday, the 31st day of January, 1939, the plaintiff appearing in person and by his attorneys, Fancher Sarchet and J. W. Vaughn, the defendants The Water Supply & Storage Company and The Tunnel Water Company appearing by their attorneys, L. R. Temple and Albert P. Fischer, the defendant The Divide Canal & Reservoir Company appearing by Robert G. Smith, its attorney, the defendants M. C. Hinderlider as State Engineer of the State of Colorado and R. A. Mosier as Commissioner of Water District No. 48 appearing in person and by their attorneys, Byron G. Rogers, Attorney General of the State of Colorado, and Shrader P. Howell, Assistant Attorney General of the State of Colorado; and the evidence adduced by the parties hereto having been concluded on the first day of

February, 1939, and the Court having heard said evidence and having read and examined the exhibits introduced by said parties and having heard the arguments of counsel, which were concluded on the 2nd day of February, 1939, and the cause having been continued to this 21st day of February, 1939, for making and entry of decree, and the Court being now sufficiently advised in the premises, DOTH FIND:

I.

That the plaintiff and the defendant corporations are each appropriators of water for the purpose of irrigation out of the Laramie River and its tributaries, said river being an interstate stream which has its source in mountainous country in Larimer County, Colorado, and flows thence in a northerly direction into the State of Wyoming. That all of the territory drained by the said Laramie River and its tributaries in Colorado comprises Water District No. 48 of the State of Colorado, and appropriations of water for irrigation purposes from said river and its tributaries in Colorado and involved in this cause have heretofore been duly adjudicated and decreed by this Court in proceedings under the applicable statutes of the State of Colorado, for the adjudication of priorities to the use of water for irrigation, and that the plaintiff and the defendant corporations are the owners respectively of priorities under said decrees of dates and rate of flow as follows:

Plaintiff, Adelrick Benziger, owner of two ditch priorities; Martin No. 1 priority of date April 20, 1883, for 15.5 second feet; and Martin No. 2 Priority of date April 30, 1887, for 14.5 second feet, for irrigation of native hay meadowland owned by him in the Laramie River valley and adjacent to the Laramie River;

Defendant The Water Supply & Storage Company, owner of Skyline Ditch priority of date August 7, 1891, for 400 second feet, for transmountain diversion to lands outside of the Laramie River watershed;

Defendant The Divide Canal & Reservoir Company, owner of Wilson Supply Ditch, priority of date June 15, 1899, for 288 second feet, for transmountain diversion to land outside of the Laramie River watershed; and

Defendant The Tunnel Water Company, owner of the Laramie Poudre Tunnel, priority of date August 25, 1902, for approximately 250 second feet, for transmountain diversion to lands outside the Laramie River watershed.

II.

That plaintiff's said two ditch appropriations are among and included in those "certain meadowland appropriations" referred to and involved in the original actions hereinafter mentioned brought by the State of Wyoming against the State of Colorado, in the Supreme Court of the United States. And the said defendants' said several appropriations are the same appropriations referred to and involved in said original actions, and are therein referred to as, "the Skyline ditch appropriations," "the Deadman Creek appropriations," and "the Laramie-Poudre Tunnel appropriation," respectively.

III.

That there are other appropriators of water out of said Laramie River and its tributaries in said Water District No. 48 for irrigation of native hay meadowland owned by them in the Laramie River Valley in Colorado, and adjacent to said river or its tributaries; and of said other appropriators all those hereinafter in this paragraph mentioned own appropriations having priorities decreed in said Water District No. 48 of an earlier date than the said Skyline appropriation and the said appropriations of the other defendants; and all of said meadowland appropriations are among and included in those "certain meadowland appropriations" referred to and involved in said original actions in the Supreme Court of the United States; That in the foregoing respects said meadowland appropriators are

all similarly situated to plaintiff, and plaintiff herein has brought and prosecuted this cause in his own behalf and in behalf of said other meadowland appropriators thus similarly situated. That those appropriators in whose behalf this cause is prosecuted (including plaintiff) are, and own the appropriations listed, as follows:

Name of Present Owner	Name of Ditch	Date of Appropriation	Number of Second Feet
Martin Hohnholz	Mansfield #2	6- 1-80	19.84
Clarence Oviatt	Warren	3-25-81	6.67
Emma Hohnholz	Hance	3-21-81	19.44
Clarence Oviatt	Stuck Creek	4- 1-81	16.12
G. R. Holcombe	Jim Creek	7-10-81	9
Clarence Oviatt	Bliler & Boswell (only as to that portion used in Colorado)	4- 1-82	7.04
Emma Hohnholz	Mansfield	4-20-82	11.61
R. M. Leake, Jr.	Yelton (a joint interest)	7- 1-82	30.14
Adelrick Benziger	Martin #1	4-20-83	15.5
Ralph Tatham and R. M. Leake, Jr.	La Garde	6-10-83	10.33
H. F. Piper	Ward #1	6-15-83	4.25
H. F. Piper	Ward #2	7- 1-83	9.48
R. M. Leake, Jr.	Jimmy Creek	6- 1-84	5.52
H. F. Piper	Trollope	6-15-84	6.89
Adelrick Benziger	Martin #2	4-30-87	14.50
Martin Hohnholz	Grace Creek	4- 1-88	3.07
Louis E. Sholine	Brown Ditch	5-31-90	10.
Kay H. Olson	Lamb	6- 1-90	3.88
R. M. Leake, Jr.	Jimmy Creek Ditch	5- 1-91	

IV.

That all of the irrigated lands of the said meadowland appropriators, including plaintiff, are lands in cattle ranches and are of altitude of approximately 8000 feet

above sea level, and the only crop for which they are adapted is native hay; That for the proper irrigation of said lands it is necessary to keep the same wet by continuously flooding said lands for a period of approximately sixty days during each growing season, commencing about the 25th day of May of each year; that said meadowlands are situated along and adjacent to the main Laramie River or one or more of its tributaries and slope toward said river or tributary. And as heretofore applied on and to the irrigation of said meadowlands, of the waters diverted from the flow of said river system at the headgates of the several ditches under said appropriations, approximately 90% thereof has returned to the said river through percolation and surface return flow, and only the remaining approximate 10% has been actually consumed by the meadow growth and evaporation; and all of such return flow and percolation has been available to ditches having their headgates further downstream, including all appropriators from said river in the State of Wyoming. That the total water diverted during each year under the said meadowland appropriations herein before listed (and exclusive of other meadowland appropriation not herein listed, but which are included in those "certain meadowland appropriations" mentioned in the said Supreme Court actions), at the headgates of said listed ditches has been approximately 25,600 acre feet, of which approximately 90% has returned to the stream flow for the benefit of diversions lower downstream, including the State of Wyoming. And that until the situation now confronting the water users and appropriators in said Water District No. 48 arose by reason of the limitations placed upon Colorado and her appropriators of water, under the findings, opinions, and decrees of the Supreme Court of the United States hereinafter mentioned, the natural flow of said Laramie River and its tributaries was and has been sufficient to supply all decreed priorities in said Water District No. 48.

V.

That heretofore those certain original suits involving the appropriations and use of water from said Laramie River, an interstate stream as aforesaid, were brought and prosecuted by the State of Wyoming against the State of Colorado before the Supreme Court of the United States, and the findings, opinions, and decrees of said Supreme Court are officially reported as follows, to-wit:

No. 3 original, October term, 1921, entitled The State of Wyoming v. The State of Colorado, decided June 5, 1922, officially reported in 259 U. S. at page 419 and decree reported in 259 U. S. at page 496. (Also reported in 42 S. Ct. 552 and 594; 66 L. Ed. 999.)

On October 9, 1922, a modified decree was entered in the foregoing cause which is officially reported in 260 U. S. at page 1. (Also reported in 43 S. Ct. 2; 66 L. Ed. 1026.)

No. 15 original, October Term, 1931, entitled The State of Wyoming v. The State of Colorado, decided upon motion to dismiss May 31, 1932, officially reported in 286 U. S. at page 494. (Also reported in 52 S. Ct. 621; 76 L. Ed. 1245.)

No. 10 original, which is the same cause as the foregoing No. 15 original, October Term, 1935, entitled The State of Wyoming v. The State of Colorado, officially reported in 298 U. S. at page 573. (Also reported in 56 S. Ct. 912.) (And decree therein officially reported in ..... U. S. at page ..... Exhibit "E" herein.)

VI.

That in and by said suits the Supreme Court of the United States found, determined, and decreed, as between the two States and their respective appropriators of water from the Laramie River and all its tributaries, excluding Sand Creek, that by reason of prior appropriations by Colorado appropriators, in limits as to quantity of water

and as to dates of appropriation fixed by said Court as between the two States, that there was thereby confirmed and established:

The right of the State of Colorado, or of any one recognized by her as duly entitled thereto, to divert and take within that State a total of 39,750 acre feet in each year (and no more) in virtue of appropriations prior to Wyoming appropriations and in amounts as follows:

(1) 18,000 acre feet of water per annum from the Laramie River and its tributaries in virtue of the Skyline Ditch appropriations;

(2) 4,250 acre feet of water per annum from such stream and its tributaries in virtue of certain meadowland appropriations;

(3) 2,000 acre feet from the headwaters of Deadman Creek, a tributary of the Laramie River, through the Wilson supply ditch;

(4) 15,500 acre feet of water per annum from the Laramie River and its tributaries, in virtue of the Laramie-Poudre tunnel appropriation;

and all remaining waters of said river and its tributaries was thereby confirmed and established in the State of Wyoming and her water claimants. And by further provisions in said decrees the defendant therein, the State of Colorado, was specifically enjoined from diverting or taking any waters in excess of the confirmed rights to 15,500 acre feet and 4,250 acre feet in virtue of Laramie-Poudre Tunnel appropriation and in virtue of the meadowland appropriations, respectively, there being no showing in said suits of any exigency requiring specific injunctions against the State of Colorado respecting the other recognized and accredited diversions by the other defendant corporations herein.

VII.

That from and by reason of said suits, and the said opinions, decrees, and injunctions rendered therein by the Supreme Court of the United States, uncertainties exist and controversies have arisen between the defendants and the plaintiff and the other appropriators in whose behalf this action is brought and prosecuted: The defendant corporations and the defendant water officials contending and construing said Supreme Court decisions and decrees as modifying the adjudication decrees of this Court in the State of Colorado as pertain to said Water District No. 48, and in effect nullifying said state decrees by adjudicating amounts and priority of right as between the defendant corporations and the meadowland appropriators, irrespective of the adjudications in this Court and the priorities as decreed in this Court; and the plaintiff, for himself and others similarly situated, contending and construing said Supreme Court decisions and decrees as limiting Colorado's use of said river waters in a total allocation as between the states, and contending that the meadowland appropriations should be first satisfied according to their priorities to the extent of such total allocation, whereby only the remaining water accredited to Colorado would be available to the defendant corporations under their junior appropriations. Wherefore, to remove such uncertainty and terminate such controversy, this Declaratory Judgment and Decree is proper and necessary to declare the status and rights of the parties hereto, and to direct a proper administration of the diversion of waters in Water District No. 48 for irrigation.

VIII.

That said defendant corporations assert the right to divert and take and unless enjoined and restrained will, if water is available, divert and take each year from the Laramie River and its tributaries a total of 35,500 acre feet of water; that the defendant The Water Supply &

Storage Company asserts the right to divert and take and will divert and take, unless enjoined from so doing, each year 18,000 acre feet of water; that the defendant corporation The Tunnel Water Company asserts the right to divert and take, and will divert and take, unless enjoined from so doing, each year 15,500 acre feet of water; that the defendant The Divide Canal & Reservoir Company asserts the right to divert and take, and will divert and take, unless enjoined from so doing, each year 2,000 acre feet of water; that the defendant M. C. Hinderlider, as State Engineer of the State of Colorado, proposes and asserts that he will, beginning in April of the present year, unless enjoined and restrained from so doing, administer the distribution of the water of the said Laramie River and its tributaries by permitting each defendant corporation to take each year the several amounts above stated, making said total of 35,500 acre feet, without regard to priorities as determined by Colorado decree; and that he will distribute only the remaining 4,250 acre feet of the total accord or mass allocation to the ranchers in said Water District, measured at the headgates; that the situation thus disclosed renders the plaintiff and said other persons similarly situated insecure in their rights, will lead to a multiplicity of suits, and there is no adequate remedy at law in the premises, and this is a proper case for injunction.

The Court Doth Further Find and Declare:

IX.

That said original suits in the Supreme Court of the United States were of nature between the two states, and the decisions therein were intended to, and did, determine only the relative rights of the two states to divert and take the waters of the Laramie River and its tributaries; and the question of priority in time and right of the appropriations were therein dealt with and resolved and decreed only as between the two states; and it was not the purpose of said suits or of the opinions and decrees entered therein

to withdraw said appropriations and water claims from the operation of the local laws of Colorado, or to restrict their utilization in any way not affecting the rights of the State of Wyoming and her water claimants. That the fixing therein of the meadowland appropriations and enjoining any diversion and taking in excess thereof in virtue of such appropriations was and is, and was intended to be, only as between the two states, and not an adjudication or re-adjudication of the relative rights of the owners of the decreed appropriations in said Water District No. 48 in the State of Colorado; and that the relative rights of all of the owners of all of said decreed appropriations in the State of Colorado as to priority in time and right—and amount, so long as the aggregate of water diverted does not exceed the total of 39,750 acre feet accredited to Colorado appropriations, exclusive of diversions from Sand Creek or its tributaries—are subject to the constitution and laws of the State of Colorado and to the decrees heretofore entered in this Court in adjudication proceedings for said Water District No. 48.

X.

That the plaintiff and other meadowland appropriators and the defendant appropriators are entitled to divert and take water for irrigation from the Laramie River and its tributaries, through properly installed headgates in their respective ditches, according to their respective priorities in time and right as fixed by the adjudication decrees of this Court for Water District No. 48, until the total so diverted and taken by all such appropriators in each year shall equal in the aggregate the amount of 39,750 acre feet from the Laramie River and its tributaries, excluding Sand Creek; and the water officials have the duty so to administer said water. Provided, in addition to the division and measurement of said waters as heretofore by cubic feet of flow per second of time, the total diversion at the headgates in acre feet is to be determined and recorded to the end that the total amount allocated to Colorado may not

be exceeded. And provided further, since by the limitations now placed upon the State of Colorado no credit is given for return waters from diversions made by the meadowland appropriators in said Water District and all such return waters are lost to Colorado's allocation, the permitting of any unnecessary return to the stream of diverted and measured water shall be deemed waste and, as such, prohibited by the adjudication decrees of this Court.

It is Therefore Ordered and Decreed:

That in the administration of the distribution of water of the Laramie River and its tributaries in Water District No. 48 in the State of Colorado, the parties hereto shall proceed in accordance with the foregoing findings, declarations, and directions and in conformity with the Constitution and laws of the State of Colorado, under the decrees of this Court pertaining to said Water District No. 48 and upon the recognized practice of administration applied to all streams in Colorado, whereby each ditch be permitted to divert each day under its decree in accordance with date of priority. When 39,750 acre feet of water have been diverted by all the decrees exclusive of those from Sand Creek and its tributaries, all headgates are to be closed for the balance of the season.

It is further ordered, adjudged, and decreed that in the administration of the distribution of water under the decreed priorities of said Water District No. 48, all of said opinions and decrees of the Supreme Court of the United States shall be considered together and as a total limitation and mass allocation to Colorado of 39,750 acre feet annually from the waters of said river and its tributaries, exclusive of Sand Creek, and that the amount taken and distributed any year shall be measured and shall not exceed such total of 39,750 acre feet measured at the headgates, so long as said limitation continues to exist.

It is further ordered, adjudged, and decreed that the plaintiff appropriators and said defendant corporations

and each of them is enjoined and restrained from taking water from said river and its tributaries excepting as herein limited and directed; and that the defendant M. C. Hinderlider as State Engineer of the State of Colorado and all of his subordinate officers, including the defendant R. A. Mosier as Water Commissioner of said District No. 48, be and that each of them is hereby enjoined and restrained from administering the distribution of water in said Water District No. 48 otherwise than as herein directed and decreed.

It is further ordered, adjudged, and decreed that the defendant corporations herein pay the costs herein taxed and to be taxed.

Done in open court this 21st day of February, 1939, as of date February 2, 1939.

By the Court:

CLAUDE C. COFFIN, Judge.

EXHIBIT "B."

AFFIDAVIT.

STATE OF COLORADO, }
COUNTY OF WELD } ss.

ROBERT G. SMITH, being first duly sworn, upon oath deposes and says:

That he is Attorney for The Divide Canal and Reservoir Company, which is the owner of the Wilson Supply Ditch, and on July 1, 1939, was present at a conference between the State Engineer of the State of Wyoming, the Attorney General of the State of Wyoming, the Governor of the State of Colorado, the State Engineer of the State of Colorado, the Attorney General of the State of Colorado, and representatives of water users from the Laramie River

in Colorado, in relation to a controversy between said respective states over the waters of said Laramie River;

That during said conference the State Engineer of the State of Colorado, particularly addressing the State Engineer of the State of Wyoming, stated in effect that the State of Wyoming could not be injured materially by any amount of diversion from the Laramie River by the meadow land appropriators because 90% of the water diverted returned to the stream before it reached the state line; that the State Engineer of the State of Wyoming replied, in effect, that he did not concede that 90% of said water so diverted returned to the stream and stated that in his opinion "not more than 80 to 85%" returned;

That during said conference it was conceded by all of said persons that in excess of 75% of water diverted from the Laramie River by said meadow land appropriators did, in fact, return to said river before it reached the state line; that said Wyoming officials stated, in effect, that they did not care whether the headgates of the meadow land appropriators were closed or not, because diversions by said meadow land appropriators in the State of Colorado did not, in fact, withhold more than a small part of the water diverted by said meadow land appropriators from the State of Wyoming;

That he is informed and believes, and on such information and belief states that said Wilson Supply Ditch was not re-opened nor was any water diverted therethrough after notice to close same was given by the State Engineer of the State of Colorado on the 19th day of June, A. D. 1939.

Further affiant saith not.

ROBERT G. SMITH.

ROBERT G. SMITH.

STATE OF COLORADO, }
County of Weld } ss.

The above and foregoing Affidavit was subscribed and sworn to before me this 16th day of March, A. D. 1940, by ROBERT G. SMITH.

My Commission Expires Oct. 7, 1941.

Tracy C. Cameron,
(Seal) Notary Public.

EXHIBIT "C."

STATE OF COLORADO, }
County of Larimer } ss.

FANCHER SARCHET, being first duly sworn upon his oath, deposes and says:

That he was present at a meeting on July 1, 1939, in the office of Ralph L. Carr, Governor of the State of Colorado, whereat there were present Ralph L. Carr, Governor of the State of Colorado, M. C. Hinderlider, State Engineer, J. E. Whitten, Division Engineer, Byron G. Rogers, Attorney General, Shrader P. Howell, Deputy Attorney General, all officers of the State of Colorado, and Fancher Sarchet Robert G. Smith, Lawrence R. Temple, Albert P. Fischer, all of the State of Colorado, and L. C. Bishop, State Engineer, and Ewing T. Kerr, Attorney General of the State of Wyoming and others. That it was stated by Ewing T. Kerr, Attorney General of the State of Wyoming and acquiesced in by L. C. Bishop, State Engineer of the State of Wyoming, that the State of Wyoming did not care and was not concerned in the amount of water diverted from the Laramie River in Colorado by the meadowland users, but only desired to reduce the use of said water from said river by the transmountain diversion interests.

Fancher Sarchet.

Subscribed and sworn to before me this 16th day of March, A. D. 1940.

My commission expires: Sept. 15, 1940.

FRANK W. MOORE,
Notary Public.

(Seal)

EXHIBIT "D."

STATE OF COLORADO, }
COUNTY OF LARIMER } ss.

ALBERT P. FISHCER, being first duly sworn upon his oath, deposes and says:

That he was present at a meeting on July 1, 1939, in the office of Ralph L. Carr, Governor of the State of Colorado, whereat there were present Ralph L. Carr, Governor of the State of Colorado, M. C. Hinderlider, State Engineer, J. E. Whitten, Division Engineer, Byron G. Rogers, Attorney General, Shrader P. Howell, Deputy Attorney General, all officers of the State of Colorado, and Fancher Sarchet, Robert G. Smith, Lawrence R. Temple, Albert P. Fisher, all of the State of Colorado, and L. C. Bishop, State Engineer, and Ewing T. Kerr, Attorney General of the State of Wyoming and others. That it was stated by Ewing T. Kerr, Attorney General of the State of Wyoming and acquiesced in by L. C. Bishop, State Engineer of the State of Wyoming, that the State of Wyoming did not care and was not concerned in the amount of water diverted from the Laramie River in Colorado by the meadowland users, but only desired to reduce the use of said water from said river by the transmountain diversion interests.

ALBERT P. FISCHER.

Subscribed and sworn to before me this 18th day of March, A. D. 1940.

My commission expires: Sept. 15, 1940.

FRANK W. MOORE,
Notary Public.

(Seal)

EXHIBIT "E."

STATE OF COLORADO, }
County of Larimer } ss.

LAWRENCE R. TEMPLE, being first duly sworn upon his oath, deposes and says:

That he was present at a meeting on July 1, 1939, in the office of Ralph L. Carr, Governor of the State of Colorado, whereat there were present Ralph L. Carr, Governor of the State of Colorado, M. C. Hinderlider, State Engineer, J. E. Whitten, Division Engineer, Byron G. Rogers, Attorney General, Shrader P. Howell, Deputy Attorney General, all officers of the State of Colorado, and Fancher Sarchet, Robert G. Smith, Lawrence R. Temple, Albert P. Fischer, all of the State of Colorado, and L. C. Bishop, State Engineer, and Ewing T. Kerr, Attorney General of the State of Wyoming and others. That it was stated by Ewing T. Kerr, Attorney General of the State of Wyoming and acquiesced in by L. C. Bishop, State Engineer of the State of Wyoming, that the State of Wyoming did not care and was not concerned in the amount of water diverted from the Laramie River in Colorado by the meadowland users, but only desired to reduce the use of said water from said river by the transmountain diversion interests.

Lawrence R. Temple.

Subscribed and sworn to before me this 18th day of March, A. D. 1940.

My commission expires: Sept. 15, 1940.

Frank W. Moore,
Notary Public.

(Seal)

EXHIBIT "F."

AFFIDAVIT OF M. C. HINDERLIDER.

STATE OF COLORADO, }
City and County of Denver } ss.

M. C. HINDERLIDER, of lawful age, being first duly sworn upon his oath deposes and says that he is now and for many years last past has been the duly appointed, qualified and acting State Engineer of the State of Colorado; that on to-wit Saturday, July 1, A. D. 1939, this affiant attended a protracted conference respecting the administration of the waters of the Laramie River within the purview of the decree of the Supreme Court of the United States and the decree of the District Court of Colorado respecting said waters; that among others there were present at said conference Honorable Ewing T. Kerr, Attorney General of Wyoming, and Mr. L. C. Bishop, State Engineer of Wyoming, Governor Carr of Colorado, Attorney General Rogers of Colorado, and Attorneys Temple, Smith, Sarchet, and others, representing certain of the water users involved. That the only protest made by Wyoming officials on said occasion, was respecting the so-called Trans-Mountain Diversions, notwithstanding the fact that at said time said Trans-Mountain Diversions had not nearly equaled the allotments indicated by the decree of the Supreme Court of the United States; that both Messrs. Kerr and Bishop, representing Wyoming, expressly stated, not only to this affiant but to the conference generally, that they had no objection so ever to continued diversions as respects the Meadowland appropriations—those involved in the decree of June 1, A. D. 1936, in the Supreme Court of the United States; that at the time of said conference vastly more than 4250 acre feet had been diverted by said Meadowland appropriators, or approximately 20,000 acre feet, but notwithstanding which it was repeatedly stated by both Messrs. Kerr and

Bishop that further diversions by said Meadowland appropriators were not and would not be objected to; that State Engineer Bishop of the State of Wyoming stated that in his opinion at least 75% of said Meadowland diversions were returned to the Laramie River and hence became subject to Wyoming's use. That as hereinbefore stated the only objections voiced by either Attorney General Kerr or State Engineer Bishop of Wyoming related to the Trans-Mountain Diversions. Further affiant sayeth not.

M. C. HINDERLIDER.

Subscribed and sworn to before me this 18th day of March, A. D. 1940.

My commission expires July 6, 1942.

ANN G. LANDY,
Notary Public.

(Seal)

IN THE

Supreme Court of the United States

October Term, 1935.

No. 10, Original.

THE STATE OF WYOMING, *Complainant,*

vs.

THE STATE OF COLORADO, *Defendant.*

ANSWER AND RETURN OF THE DEFENDANT, THE STATE OF COLORADO.

RALPH L. CARR,
Governor of the State of Colorado,
BYRON G. ROGERS,
Attorney General of the State of Colorado,
HENRY E. LUTZ,
Deputy Attorney General,
S. P. HOWELL,
Assistant Attorney General.

J.W. Vaughn

Fancher Sarchet

CLIFFORD H. STONE,
JEAN S. BREITENSTEIN,
Of Counsel.

CLARK QUICK-PRINTING CO., LAWRENCE 1332-34, DENVER, COLO.

IN THE

Supreme Court of the United States

October Term, 1935.

No. 10, Original.

THE STATE OF WYOMING, *Complainant,*

vs.

THE STATE OF COLORADO, *Defendant.*

ANSWER AND RETURN OF THE DEFENDANT, THE STATE OF COLORADO.

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

Comes now the State of Colorado, defendant above named, by Byron G. Rogers, Attorney General of the State of Colorado, at the request and by the direction of Ralph L. Carr, Governor of the State of Colorado, and for its answer to the petition of the complainant and for its return to the rule to show cause issued herein on October 9, 1939, says:

I.

1. It admits each and every allegation of Paragraphs numbered "First" and "Second" of the petition.

2. It admits each and every allegation of Paragraph numbered "Third" and alleges that it was not the purpose of the decrees of this Court entered in this cause to withdraw the water claims mentioned therein from the operation of the local Colorado laws relating to their transfer or to restrict their utilization in ways not affecting Wyoming and its claimants as against Colorado and its claimants. Said decrees were intended to, and do, define the entire quantity of water which Colorado and its appropriators may divert from the Laramie River and its tributaries and thus withhold from Wyoming and its appropriators.

3. The defendant consents that the former proceedings in this cause mentioned in Paragraph "Fourth" and all other former proceedings in this cause may be considered by this Court in the consideration and determination of the petition now pending herein.

4. (a) The defendant admits each and every allegation of Paragraph numbered "Fifth." The diversions therein set out exceeded by 115.43 acre feet the amount of water, to-wit, 39,750 acre feet per annum from the Laramie River and its tributaries excluding Sand Creek, decreed by this Court to be Colorado's equitable apportionment of the stream flow. Such excess diversion was inadvertent and unintentional, and was due solely to the extreme difficulties of administering and regulating the flow of the Laramie River and its tributaries in Colorado. The region in which such diversions are made is extremely mountainous and is approximately thirty-three miles long by twelve miles wide. Many of the diversion points are located in isolated sections which are difficult to reach. The task of checking the recording devices at diversion points and assembling the data so obtained is so difficult that it is impossible to close all the headgates at the very moment when Colorado's equitable share of the stream flow has been diverted. As to such 115.53 acre feet, the defendant says that the diversion thereof was accidental, inadvertent and unintentional.

(b) The diversions set out in Paragraph numbered "Fifth" exceed the amount apportioned to Colorado in the decree of this Court dated October 9, 1922 (260 U. S. 1), in virtue of the meadowland appropriations and are less than the amounts there apportioned to said state in virtue of the transmountain diversions. This resulted from the application of the local Colorado laws under former water adjudication decrees and a decree of the District Court of Larimer County, Colorado, the proper court for the adjudication of water rights in Colorado Water District No. 48 wherein the diversions in question are made. Said decree of the Colorado District Court was entered on the 2nd day of February, 1939, in its case number 7898 in which Adelrick Benzinger was the plaintiff and The Water Supply & Storage Company et al., were the defendants. A copy of said decree, marked Exhibit "A," is attached hereto for reference and greater certainty. In said cause the plaintiff was the owner of a meadowland appropriation and sued in behalf of himself and all others similarly situated. The defendants were the owners of the transmountain diversions from the Laramie River, and the proper Colorado water administration officials. The Court there found that there were meadowland appropriations from the Laramie River in a total amount of 203.28 cubic feet of water per second of time senior and prior to any appropriation for a transmountain diversion and decreed that:

> "That the plaintiff and other meadowland appropriators and the defendant appropriators are entitled to divert and take water for irrigation from the Laramie River and its tributaries, through properly installed headgates in their respective ditches, according to their respective priorities in time and right as fixed by the adjudication decrees of this Court for Water District No. 48, until the total so diverted and taken by all such appropriators in each year shall equal in the aggregate the amount of 39,750 feet from the Laramie River and its tribu-

taries, excluding Sand Creek; and the water officials have the duty so to administer said water. Provided, in addition to the division and measurement of said waters as heretofore by cubic feet of flow per second of time, the total diversion at the headgates in acre feet is to be determined and recorded to the end that the total amount allocated to Colorado may not be exceeded. And provided further, since by the limitations now placed upon the State of Colorado no credit is given for return waters from diversions made by the meadowland appropriators in said Water District and all such return waters are lost to Colorado's allocation, the permitting of any unnecessary return to the stream of diverted and measured water shall be deemed waste and, as such, prohibited by the adjudication decrees of this Court."

5. The defendant admits each and every allegation contained in Paragraph numbered "Sixth."

6. (a) Answering Paragraph numbered "Seventh" the defendant admits that during the period from June 22 to July 11, 1939, diversions were made from the Laramie River through the ditches mentioned in addition to the diversions stated in Paragraph numbered "Fifth" of the petition of the State of Wyoming. As to whether such diversions were in the amounts stated in Paragraph numbered "Seventh," the defendant is without knowledge. Such diversions were made without the authorization, permission or consent of the water officials of the State of Colorado and resulted from a dispute arising between the meadowland appropriators and the transmountain appropriators as to the construction to be placed upon the decrees of this Court and the aforesaid decree of the Colorado District Court. Upon being advised of such diversions the Colorado water officials consulted with the various Colorado appropriators and the water officials of the State of Wyoming and after such conferences again closed the head-

gates of all ditches involved herein. Said headgates remained closed during the remainder of the 1939 irrigation season.

(b) The diversions mentioned in Paragraph numbered "Seventh" of the petition, if such diversions were in fact made, did not result in or cause the withholding from Wyoming of any portion of her equitable share of the flow of the Laramie River. By its several decrees this Court has apportioned to Colorado and its water users a total of 39,750 acre feet of water per annum; has held that it was not the purpose of its said decrees to withdraw water claims dealt with therein from the operation of local laws relating to their transfer or to restrict their utilization in ways not affecting the rights of one state and her claimants as against the other state and her claimants; and has construed its own decree by stating: "* * * it was intended to and does define and limit the quantity of water which Colorado and her appropriators may divert from the interstate stream and its tributaries and thus withhold from Wyoming and her appropriators."

By decree of the Colorado District Court hereinbefore referred to the Colorado water officials are directed and required to distribute the water and administer the water rights of the Laramie River in Colorado in accordance with decrees adjudicated in Colorado up to the time when Colorado's equitable share, as determined by this Court, is exhausted. In accordance therewith 22,527 acre feet of water was diverted by and through the Colorado meadowland ditches and 17,223 acre feet of water was exported from the Laramie River Basin by the several transmountain diversion ditches. The 17,223 acre feet of water exported from the basin, all of which water is completely lost to the stream and thus withheld from Wyoming, is a quantity 18,157 acre feet less than the 35,500 acre feet decreed by this Court for such exportations in Colorado. Of the 22,527 acre feet of water diverted by the Colorado meadowland ditches, a large portion thereof returned to the

Laramie River above the point where said river enters the State of Wyoming, and thus became available for use in Wyoming, the said portion so returned being of such amount that the quantity withheld from the stream, and thus withheld from the State of Wyoming and its water users, was less than the 4,250 acre feet of water decreed to Colorado in virtue of the said meadowland appropriations.

Upon the closing of the headgates on June 19, 1939, as alleged in the petition, the owners of water rights in and to the waters of the Laramie River in Colorado asserted that, out of the 39,750 acre feet of water allocated to Colorado, not more than 21,593 acre feet of water had been taken and withheld up to that time, and that there was a balance of 18,157 acre feet of water which was and should be available for diversion and use in Colorado. Relying upon the validity of such contention, the said Colorado appropriators, except the Wilson Supply Ditch, did open their several headgates and made additional diversions of water. The defendant alleges that the water so diverted was taken without its knowledge, approval or consent; that upon its attention being called to such actions, the said headgates were promptly and effectively closed; and that such diversions did not, in any event, deprive Wyoming and its appropriators of any of Wyoming's equitable share of the flow of the interstate stream.

7. Defendant admits that this Court entered the decree mentioned in Paragraph numbered "Eighth." Defendant alleges that it was not the purpose or intent of said decree to withdraw Colorado's equitable share of the flow of the Laramie River from the operation and control of the local Colorado laws pertaining thereto.

8. Defendant denies each and every allegation of Paragraph numbered "Ninth." Defendant alleges that the diversions made by the Colorado meadowland ditches, if such diversions were in fact made, as therein stated, did

not cause or result in the withholding from Wyoming and her appropriators of a greater amount of water than Colorado and her appropriators are permitted to withhold by the decree of this Court dated October 9, 1922 (260 U. S. 1), so construed by this Court (286 U. S. 494), wherein the Court held that its said decree was intended to and does define and limit the quantity of water which Colorado may divert and thus withhold from Wyoming.

9. Defendant denies each and every allegation of Paragraph numbered "Tenth" and alleges that in the season of 1939 Colorado and its appropriators withheld from Wyoming and its appropriators not more than 29,000 acre feet of water.

10. Answering Paragraph numbered "Eleventh," defendant admits that in the summer of 1939 the complainant asserted to the defendant that water in excess of 39,750 acre feet was being diverted in the State of Colorado from the Laramie River and requested that the necessary headgates be closed to prevent further diversions. Defendant denies that in the year 1939, or at any other time, any water in excess of Colorado's equitable share of the flow of said stream as determined by this Court has been withheld from the complainant.

11. Answering Paragraph numbered "Twelfth," defendant admits that on or about July 1, 1939, officials of the complainant and defendant met in Denver, Colorado, and discussed the administration of the flow of the Laramie River in Colorado; admits that at said time and place protests were made by officials of the complainant; denies that any excessive diversions from the Laramie River were made by the defendant, or any persons acting by, through or under the defendant; denies that the officials of the defendant admitted that the defendant had made any excessive diversions of water from said stream; denies that the officials of the defendant refused to close headgates to prevent improper diversions. Alleges that at said confer-

ence the officials of the complainant did not insist upon an immediate closing of the meadowland ditch headgates and did expressly admit that the return flow to the stream from the Colorado meadowland diversions were so great in amount that no damage or injury would result to Wyoming and its water users from such diversions. Denies each and every allegation of said paragraph not herein specifically admitted.

12. Answering Paragraph numbered "Thirteenth," the defendant admits that the protests therein mentioned were made by the complainant. Alleges that such protests then were and now are without any basis whatsoever in fact. Alleges that the defendant has not diverted, and does not intend to withhold from the complainant, any water except that within Colorado's equitable portion of the flow of the Laramie River as determined by the decrees of this Court.

13. As to the matters and things contained in the affidavits mentioned in Paragraph numbered "Fourteenth," the defendant says that it has not and cannot obtain sufficient knowledge or information on which to base a belief and therefore denies the same.

14. Answering Paragraph numbered "Fifteenth," the defendant admits that the diversions involved herein are within the borders of the State of Colorado and without the jurisdiction of the State of Wyoming; denies that the defendant, its officers, agents, servants or water claimants have unlawfully diverted water belonging to or being the property of the complainant; and denies that the complainant or her water users have suffered or will suffer any damage whatsoever in the premises.

15. Defendant denies each and every allegation of the Petition of the State of Wyoming not specifically admitted herein.

II.

AND TO FURTHER ANSWER SAID PETITION AND TO SHOW FURTHER CAUSE IN THE PREMISES:

1. (a) The defendant alleges that under the doctrine of appropriation and rule of priority that prevails in Colorado, and in the administration of water rights and the distribution of water among owners of such rights, the return to the stream of waters diverted therefrom is a most important factor which may not be disregarded either physically or legally. By its former decisions and decrees this Court has held that Colorado was entitled to export from the Laramie River and its tributaries (excluding Sand Creek) and take to another watershed a quantity of water aggregating 35,500 acre feet per annum. All of such water is wholly lost to the Laramie River Basin and none of it can return to the said stream so as to become available for diversion and use in Wyoming. By reason of the decrees of the Colorado District Court these exportations must be and are subordinated to certain of the Colorado meadowland appropriations because such meadowland appropriations, or some of them, are senior in time and prior in right. The Colorado meadowland appropriations are located wholly within the basin of the Laramie River, and diversions thus made are largely returned directly to the interstate stream, thus becoming available for diversion and use in Wyoming. Colorado is and should be entitled, in arriving at the quota of 39,750 acre feet per annum, which this Court has held it is entitled to withhold from Wyoming, to deduct the amount of the returns from the quantities diverted by the Colorado meadowland ditches, thus to arrive at the quantity withheld from Wyoming and its appropriators. Otherwise Colorado cannot attain its equitable share of the waters of the interstate stream which this Court has held it is entitled to withhold from Wyoming.

(b) The facts herein alleged relative to the return of water in virtue of the diversions made by the Colorado meadowland ditches, and as to the amount thereof in relation to the quantities diverted by the said ditches, are not in dispute, and throughout this proceeding the said facts have been, and are now, recognized and conceded by complainant, the State of Wyoming. In the original Bill of Complaint filed by the State of Wyoming herein it is alleged (page 7, Vol. 1, Transcript of Record):

> "And your orator avers that owing to the character of the said drainage basin in the said State of Colorado and the character of the soil and its underlying strata at the places where said irrigation in Colorado was accomplished, a large proportion, to-wit, more than seventy-five per cent of the waters so used within the said drainage basin in Colorado for irrigation, actually returned to the said Laramie River and its tributaries before the said stream crossed into the State of Wyoming and above the points of diversion of said water by your orator and its citizens, * * *."

(c) Defendant alleges that the amount of water which returns to the Laramie River from the diversions made by the Colorado meadowland ditches is susceptible of measurement and amounts to more than seventy-five per cent of such diversions. That since the decrees were entered in this cause Colorado, by surveys and investigations, and by the installation and operation of measuring devices, has discovered evidence which will sustain: (1) that one acre foot of water per acre is wholly insufficient to produce a crop on the native hay meadows; (2) that the return flow from meadowland irrigation can be determined with reasonable certainty. Unless such return flow is taken into consideration Colorado is deprived of its equitable share of the water of the interstate stream as defined and determined by this Court.

2. (a) The defendant says that the decisions of this Court in this cause specifically hold that the water claims of Colorado appropriators mentioned therein were not withdrawn from the operation of the local Colorado laws relating to their transfer and were not restricted in their utilization in ways not affecting Wyoming and its claimants as against Colorado and its claimants. Notwithstanding such decisions, this Court's decree of June 1, 1936, as construed by the complainant, and the Colorado transmountain appropriators, purports to enjoin Colorado and her water claimants from diverting out of the Laramie River more than 4,250 acre feet of water per annum in virtue of and through the meadowland appropriations, regardless of the seniority of priority of such meadowland appropriation under the local Colorado laws.

(b) A construction of the decrees of this Court which prevents Colorado water users from diverting from the Laramie River water to which they are entitled under the Colorado laws constitutes and is an impairment of vested property rights. The limitation of meadowland appropriators to headgate diversions of 4,250 acre feet of water per annum disregards the applicable Colorado law and the admitted physical facts that at least seventy-five per cent of the water diverted at the meadowland ditch headgates returns to the stream and is confiscatory, making the beneficial application of water for the production of crops on said land impossible and rendering said lands valueless, all in violation of Article V of the Amendments to the Constitution of the United States.

III.

The irrigation works of the Colorado transmountain appropriators, as appears from the pleadings and testimony heretofore introduced in this cause, were constructed at a great cost to carry water from the Laramie River and its tributaries to the fertile valleys of the South Platte basin in Northern Colorado. The decisions of this Court have recognized the right of Colorado to export from the Laramie River to the South Platte basin and thus withhold from the Laramie River for use in Colorado 35,500 acre feet of water. After the rendition by this Court of its decree of October 9, 1922, Colorado, and its transmountain appropriators considered that the right so to export said 35,500 acre feet of water away from the watershed of the Laramie River was vested and determined, and large sums of money were spent in improving, repairing and perfecting such transmountain appropriations. From the date of said decree of October 9, 1922, up until the entry of the decree of June 1, 1936, Colorado and its meadowland appropriators considered that the decree of October 9, 1922, was properly construed to limit the diversions for the Colorado meadowland ditches to such amounts as would result in a consumptive use and consequent withholding from Wyoming of an amount of water equal to 4,250 acre feet per annum. Such a construction of the decree of October 9, 1922, would and did result in an administration of the flow of the Laramie River in conformity with the Colorado water laws recognizing rights based upon seniority and priority. This situation has been changed by the decree of this Court dated June 1, 1936, which has been construed by the District Court of Larimer County, Colorado, as restricting Colorado's rights in virtue of the meadowland appropriations to headgate diversions of 4,250 acre feet per annum. Such a limitation upon the meadowland diversions had the effect of disturbing the relative rights of Colorado water users on the Laramie River for the reason that

4,250 acre feet of water per annum is insufficient to supply the meadowland priorities which are senior to the priorities of the transmountain appropriators. The decree of the District Court of Larimer County, Colorado, was intended to maintain the relative rights of Colorado appropriators from the Laramie River and seeks to accomplish that purpose by the taking of water from the transmountain appropriators for diversion and use by the meadowland appropriators. Such taking of water from the Colorado transmountain appropriators to satisfy the senior meadowland appropriations results in the inability of the transmountain appropriators to export from the Laramie River 35,500 acre feet of water per annum and further results in the withholding from the State of Wyoming of approximately 15,000 acre feet of water per annum instead of 39,750 acre feet of water per annum which this Court has held Colorado is entitled to withhold. In view of the foregoing, Colorado says that, under the situation which has developed since the entry by this Court of its decree of June 1, 1936, Colorado and its water users are deprived of Colorado's equitable share of the flow of the stream and that more water is made available to Wyoming and its water users than that state is entitled to receive under the doctrine of equitable apportionment.

WHEREFORE, defendant prays:

1. That evidence be taken to determine the amount of return flow to the Laramie River from the diversions at the headgates of the meadowland ditches and determine the amount of water actually withheld from the State of Wyoming;

2. That Colorado be given credit for the amount of the return flow to the Laramie River from the diversions at the headgates of the Colorado meadowland ditches in the computation of the amount of water withheld by Colorado from Wyoming and its appropriators;

3. That the Petition be dismissed and the rule to show cause be discharged;

4. That the defendant have judgment for its costs;

5. That the defendant have such other and further relief as to this Court may seem proper.

RALPH L. CARR,
Governor of the State of Colorado,

BYRON G. ROGERS,
Albert P. Fischer *Attorney General of the State of Colorado,*

Robert G. Smith HENRY E. LUTZ,
Deputy Attorney General,

Lawrence R. Temple S. P. HOWELL,
Assistant Attorney General.

CLIFFORD H. STONE,
JEAN S. BREITENSTEIN,
Of Counsel.

STATE OF COLORADO, }
City and County of Denver } ss.

BYRON G. ROGERS, of lawful age, being first duly sworn according to law, upon oath deposes and says:

That he is the Attorney General of the State of Colorado and as such, at the direction and upon the request of the Governor of said state, has prepared and read said Answer and Return to the Rule to show cause, and that the facts therein set forth, saving and excepting those averments on information and belief, are true, and that as to the facts therein alleged as upon information and belief, affiant is credibly informed and verily believes that said facts are true.

Byron G. Rogers.

Subscribed and sworn to before me this 12th day of January, A. D. 1940.

My commission expires July 6, 1942.

Ann G. Landy,
Notary Public.

(Seal)

EXHIBIT "A."

STATE OF COLORADO, }
County of Larimer } ss.

IN THE DISTRICT COURT.
No. 7897.

ADELRICK BENZIGER,
Plaintiff,

vs.

THE WATER SUPPLY & STORAGE COMPANY, a corporation, THE TUNNEL WATER COMPANY, a corporation, THE DIVIDE CANAL & RESERVOIR COMPANY, a corporation, M. C. HINDERLIDER as State Engineer of the State of Colorado, and R. A. MOSIER, as Commissioner of Water District No. 48,
Defendants.

DECLARATORY JUDGMENT AND DECREE.

This cause having come on for trial to the Court on Tuesday, the 31st day of January, 1939, the plaintiff appearing in person and by his attorneys, Fancher Sarchet and J. W. Vaughn, the defendants The Water Supply & Storage Company and The Tunnel Water Company appearing by their attorneys, L. R. Temple and Albert P. Fischer, the defendant The Divide Canal & Reservoir Company appearing by Robert G. Smith, its attorney, the defendants M. C. Hinderlider as State Engineer of the State of Colorado and R. A. Mosier as Commissioner of Water District No. 48 appearing in person and by their attorneys, Byron G. Rogers, Attorney General of the State of Colorado, and Shrader P. Howell, Assistant Attorney General of the State of Colorado; and the evidence adduced by the par-

ties hereto having been concluded on the first day of February, 1939, and the Court having heard said evidence and having read and examined the exhibits introduced by said parties and having heard the arguments of counsel, which were concluded on the 2nd day of February, 1939, and the cause having been continued to this 21st day of February, 1939, for making and entry of decree, and the Court being now sufficiently advised in the premises, DOTH FIND:

I.

That the plaintiff and the defendant corporations are each appropriators of water for the purpose of irrigation out of the Laramie River and its tributaries, said river being an interstate stream which has its source in mountainous country in Larimer County, Colorado, and flows thence in a northerly direction into the State of Wyoming. That all of the territory drained by the said Laramie River and its tributaries in Colorado comprises Water District No. 48 of the State of Colorado, and appropriations of water for irrigation purposes from said river and its tributaries in Colorado and involved in this cause have heretofore been duly adjudicated and decreed by this Court in proceedings under the applicable statutes of the State of Colorado, for the adjudication of priorities to the use of water for irrigation, and that the plaintiff and the defendant corporations are the owners respectively of priorities under said decrees of dates and rate of flow as follows:

Plaintiff, Adelrick Benziger, owner of two ditch priorities: Martin No. 1 priority of date April 20, 1883, for 15.5 second feet; and Martin No. 2 Priority of date April 30, 1887, for 14.5 second feet, for irrigation of native hay meadowland owned by him in the Laramie River valley and adjacent to the Laramie River;

Defendant The Water Supply & Storage Company, owner of Skyline Ditch priority of date August 7, 1891, for

400 second feet, for transmountain diversion to lands outside of the Laramie River watershed;

Defendant The Divide Canal & Reservoir Company, owner of Wilson Supply Ditch, priority of date June 15, 1899, for 288 second feet, for transmountain diversion to lands outside of the Laramie River watershed; and

Defendant The Tunnel Water Company, owner of the Laramie Poudre Tunnel, priority of date August 25, 1902, for approximately 250 second feet, for transmountain diversion to lands outside the Laramie River watershed.

II.

That plaintiff's said two ditch appropriations are among and included in those "certain meadowland appropriations" referred to and involved in the original actions hereinafter mentioned brought by the State of Wyoming against the State of Colorado, in the Supreme Court of the United States. And the said defendants' said several appropriations are the same appropriations referred to and involved in said original actions, and are therein referred to as, "the Skyline ditch appropriations," "the Deadman Creek appropriations," and "the Laramie-Poudre Tunnel appropriation," respectively.

III.

That there are other appropriators of water out of said Laramie River and its tributaries in said Water District No. 48 for irrigation of native hay meadowland owned by them in the Laramie River Valley in Colorado, and adjacent to said river or its tributaries; and of said other appropriators all those hereinafter in this paragraph mentioned own appropriations having priorities decreed in said Water District No. 48 of an earlier date than the said Skyline appropriation and the said appropriations of the other defendants; and all of said meadowland appropriations are among and included in those "certain meadowland appro-

priations'' referred to and involved in said original actions in the Supreme Court of the United States; That in the foregoing respects said meadowland appropriators are all similarly situated to plaintiff, and plaintiff herein has brought and prosecuted this cause in his own behalf and in behalf of said other meadowland appropriators thus similarly situated. That those appropriators in whose behalf this cause is prosecuted (including plaintiff) are, and own the appropriations listed, as follows:

Name of Present Owner	Name of Ditch	Date of Appropriation	Number of Second Feet
Martin Hohnholz	Mansfield #2	6- 1-80	19.84
Clarence Oviatt	Warren	3-25-81	6.67
Emma Hohnholz	Hance	3-21-81	19.44
Clarence Oviatt	Stuck Creek	4- 1-81	16.12
G. R. Holcombe	Jim Creek	7-10-81	9
Clarence Oviatt	Bliler & Boswell (only as to that portion used in Colorado)	4- 1-82	7.04
Emma Hohnholz	Mansfield	4-20-82	11.61
R. M. Leake, Jr.	Yelton (a joint interest)	7- 1-82	30.14
Adelrick Benziger	Martin #1	4-20-83	15.5
Ralph Tatham and R. M. Leake, Jr.	La Garde	6-10-83	10.33
H. F. Piper	Ward #1	6-15-83	4.25
H. F. Piper	Ward #2	7- 1-83	9.48
R. M. Leake, Jr.	Jimmy Creek	6- 1-84	5.52
H. F. Piper	Trollope	6-15-84	6.89
Adelrick Benziger	Martin #2	4-30-87	14.50
Martin Hohnholz	Grace Creek	4- 1-88	3.07
Louis E. Sholine	Brown Ditch	5-31-90	10.
Kay H. Olson	Lamb	6- 1-90	3.88
R. M. Leake, Jr.	Jimmy Creek Ditch	5- 1-91	

IV.

That all of the irrigated lands of the said meadowland appropriators, including plaintiff, are lands in cattle ranches and are of altitude of approximately 8000 feet above sea level, and the only crop for which they are adapted is native hay; That for the proper irrigation of said lands it is necessary to keep the same wet by continuously flooding said lands for a period of approximately sixty days during each growing season, commencing about the 25th day of May of each year; that said meadowlands are situated along and adjacent to the main Laramie River or one or more of its tributaries and slope toward said river or tributary. And as heretofore applied on and to the irrigation of said meadowlands, of the waters diverted from the flow of said river system at the headgates of the several ditches under said appropriations, approximately 90% thereof has returned to the said river through percolation and surface return flow, and only the remaining approximate 10% has been actually consumed by the meadow growth and evaporation; and all of such return flow and percolation has been available to ditches having their headgates further downstream, including all appropriators from said river in the State of Wyoming. That the total water diverted during each year under the said meadowland appropriations herein before listed (and exclusive of other meadowland appropriation not herein listed, but which are included in those "certain meadowland appropriations" mentioned in the said Supreme Court actions), at the headgates of said listed ditches has been approximately 25,600 acre feet, of which approximately 90% has returned to the stream flow for the benefit of diversions lower downstream, including the State of Wyoming. And that until the situation now confronting the water users and appropriators in said Water District No. 48 arose by reason of the limitations placed upon Colorado and her appropriators of water, under the findings, opinions, and decrees of the Supreme Court of the United States hereinafter mentioned, the natural flow of said Laramie River and its tributaries

was and has been sufficient to supply all decreed priorities in said Water District No. 48.

V.

That heretofore those certain original suits involving the appropriations and use of water from said Laramie River, an interstate stream as aforesaid, were brought and prosecuted by the State of Wyoming against the State of Colorado before the Supreme Court of the United States, and the findings, opinions, and decrees of said Supreme Court are officially reported as follows, to-wit:

No. 3 original, October term, 1921, entitled The State of Wyoming v. The State of Colorado, decided June 5, 1922, officially reported in 259 U. S. at page 419 and decree reported in 259 U. S. at page 496. (Also reported in 42 S. Ct. 552 and 594; 66 L. Ed. 999.)

On October 9, 1922, a modified decree was entered in the foregoing cause which is officially reported in 260 U. S. at page 1. (Also reported in 43 S. Ct. 2; 66 L. Ed. 1026.)

No. 15 original, October Term 1931, entitled The State of Wyoming v. The State of Colorado, decided upon motion to dismiss May 31, 1932, officially reported in 286 U. S. at page 494. (Also reported in 52 S. Ct. 621; 76 L. Ed. 1245.)

No. 10 original, which is the same cause as the foregoing No. 15 original, October Term, 1935, entitled The State of Wyoming v. The State of Colorado, officially reported in 298 U. S. at page 573. (Also reported in 56 S. Ct. 912.) (And decree therein officially reported in ..... U. S. at page..... Exhibit "E" herein.)

VI.

That in and by said suits the Supreme Court of the United States found, determined, and decreed, as between the two States and their respective appropriators of water from the Laramie River and all its tributaries, excluding

Sand Creek, that by reason of prior appropriations by Colorado appropriators, in limits as to quantity of water and to dates of appropriation fixed by said Court as between the two States, that there was thereby confirmed and established:

The right of the State of Colorado, or of any one recognized by her as duly entitled thereto, to divert and take within that State a total of 39,750 acre feet in each year (and no more) in virtue of appropriations prior to Wyoming appropriations and in amounts as follows:

(1) 18,000 acre feet of water per annum from the Laramie River and its tributaries in virtue of the Skyline Ditch appropriations;

(2) 4,250 acre feet of water per annum from such stream and its tributaries in virtue of certain meadowland appropriations;

(3) 2,000 acre feet from the headwaters of Deadman Creek, a tributary of the Laramie River, through the Wilson supply ditch;

(4) 15,500 acre feet of water per annum from the Laramie River and its tributaries, in virtue of the Laramie-Poudre tunnel appropriation;

and all remaining waters of said river and its tributaries was thereby confirmed and established in the State of Wyoming and her water claimants. And by further provisions in said decrees the defendant therein, the State of Colorado, was specifically enjoined from diverting or taking any waters in excess of the confirmed rights to 15,500 acre feet and 4,250 acre feet in virtue of Laramie-Poudre Tunnel appropriation and in virtue of the meadowland appropriations, respectively, there being no showing in said suits of any exigency requiring specific injunctions against the State of Colorado respecting the other recognized and accredited diversions by the other defendant corporations herein.

VII.

That from and by reason of said suits, and the said opinions, decrees, and injunctions rendered therein by the Supreme Court of the United States, uncertainties exist and controversies have arisen between the defendants and the plaintiff and the other appropriators in whose behalf this action is brought and prosecuted: The defendant corporations and the defendant water officials contending and construing said Supreme Court decisions and decrees as modifying the adjudication decrees of this Court in the State of Colorado as pertain to said Water District No. 48, and in effect nullifying said state decrees by adjudicating amounts and priority of right as between the defendant corporations and the meadowland appropriators, irrespective of the adjudications in this Court and the priorities as decreed in this Court; and the plaintiff, for himself and others similarly situated, contending and construing said Supreme Court decisions and decrees as limiting Colorado's use of said river waters in a total allocation as between the states, and contending that the meadowland appropriations should be first satisfied according to their priorities to the extent of such total allocation, whereby only the remaining water accredited to Colorado would be available to the defendant corporations under their junior appropriations. Wherefore, to remove such uncertainty and terminate such controversy, this Declaratory Judgment and Decree is proper and necessary to declare the status and rights of the parties hereto, and to direct a proper administration of the diversion of waters in Water District No. 48 for irrigation.

VIII.

That said defendant corporations assert the right to divert and take and unless enjoined and restrained will, if water is available, divert and take each year from the Laramie River and its tributaries a total of 35,500 acre feet of water; that the defendant The Water Supply &

Storage Company asserts the right to divert and take and will divert and take, unless enjoined from so doing, each year 18,000 acre feet of water; that the defendant corporation The Tunnel Water Company asserts the right to divert and take, and will divert and take, unless enjoined from so doing, each year 15,500 acre feet of water; that the defendant The Divide Canal & Reservoir Company asserts the right to divert and take, and will divert and take, unless enjoined from so doing, each year 2,000 acre feet of water; that the defendant M. C. Hinderlider, as State Engineer of the State of Colorado, proposes and asserts that he will, beginning in April of the present year, unless enjoined and restrained from so doing, administer the distribution of the water of the said Laramie River and its tributaries by permitting each defendant corporation to take each year the several amounts above stated, making said total of 35,500 acre feet, without regard to priorities as determined by Colorado decree; and that he will distribute only the remaining 4,250 acre feet of the total accord or mass allocation to the ranchers in said Water District, measured at the headgates; that the situation thus disclosed renders the plaintiff and said other persons similarly situated insecure in their rights, will lead to a multiplicity of suits, and there is no adequate remedy at law in the premises, and this is a proper case for injunction.

The Court Doth Further Find and Declare:

IX.

That said original suits in the Supreme Court of the United States were of nature between the two states, and the decisions therein were intended to, and did, determine only the relative rights of the two states to divert and take the waters of the Laramie River and its tributaries; and the question of priority in time and right of the appropriations were therein dealt with and resolved and decreed only as between the two states; and it was not the purpose of said suits or of the opinions and decrees entered therein

to withdraw said appropriations and water claims from the operation of the local laws of Colorado, or to restrict their utilization in any way not affecting the rights of the State of Wyoming and her water claimants. That the fixing therein of the meadowland appropriations and enjoining any diversion and taking in excess thereof in virtue of such appropriations was and is, and was intended to be, only as between the two states, and not an adjudication or re-adjudication of the relative rights of the owners of the decreed appropriations in said Water District No. 48 in the State of Colorado; and that the relative rights of all of the owners of all of said decreed appropriations in the State of Colorado as to priority in time and right—and amount, so long as the aggregate of water diverted does not exceed the total of 39,750 acre feet accredited to Colorado appropriations, exclusive of diversions from Sand Creek or its tributaries—are subject to the constitution and laws of the State of Colorado and to the decrees heretofore entered in this Court in adjudication proceedings for said Water District No. 48.

X.

That the plaintiff and other meadowland appropriators and the defendant appropriators are entitled to divert and take water for irrigation from the Laramie River and its tributaries, through properly installed headgates in their respective ditches, according to their respective priorities in time and right as fixed by the adjudication decrees of this Court for Water District No. 48, until the total so diverted and taken by all such appropriators in each year shall equal in the aggregate the amount of 39,750 acre feet from the Laramie River and its tributaries, excluding Sand Creek; and the water officials have the duty so to administer said water. Provided, in addition to the division and measurement of said waters as heretofore by cubic feet of flow per second of time, the total diversion at the headgates in acre feet is to be determined and recorded to the end that the total amount allocated to Colorado may not

be exceeded. And provided further, since by the limitations now placed upon the State of Colorado no credit is given for return waters from diversions made by the meadowland appropriators in said Water District and all such return waters are lost to Colorado's allocation, the permitting of any unnecessary return to the stream of diverted and measured water shall be deemed waste and, as such, prohibited by the adjudication decrees of this Court.

It is Therefore Ordered and Decreed:

That in the administration of the distribution of water of the Laramie River and its tributaries in Water District No. 48 in the State of Colorado, the parties hereto shall proceed in accordance with the foregoing findings, declarations, and directions and in conformity with the Constitution and laws of the State of Colorado, under the decrees of this Court pertaining to said Water District No. 48 and upon the recognized practice of administration applied to all streams in Colorado, whereby each ditch be permitted to divert each day under its decree in accordance with date of priority. When 39,750 acre feet of water have been diverted by all the decrees exclusive of those from Sand Creek and its tributaries, all headgates are to be closed for the balance of the season.

It is further ordered, adjudged, and decreed that in the administration of the distribution of water under the decreed priorities of said Water District No. 48, all of said opinions and decrees of the Supreme Court of the United States shall be considered together and as a total limitation and mass allocation to Colorado of 39,750 acre feet annually from the waters of said river and its tributaries, exclusive of Sand Creek, and that the amount taken and distributed any year shall be measured and shall not exceed such total of 39,750 acre feet measured at the headgates, so long as said limitation continues to exist.

It is further ordered, adjudged, and decreed that the plaintiff appropriators and said defendant corporations and each of them is enjoined and restrained from taking water from said river and its tributaries excepting as herein limited and directed; and that the defendant M. C. Hinderlider as State Engineer of the State of Colorado and all of his subordinate officers, including the defendant R. A. Mosier as Water Commissioner of said District No. 48, be and that each of them is hereby enjoined and restrained from administering the distribution of water in said Water District No. 48 otherwise than as herein directed and decreed.

It is further ordered, adjudged, and decreed that the defendant corporations herein pay the costs herein taxed and to be taxed.

Done in open court this 21st day of February, 1939, as of date February 2, 1939.

By the Court:

Claude C. Coffin, Judge.

In the

Supreme Court of the United States

October Term, 1935.

In Equity.

No. 10. ORIGINAL.

THE STATE OF WYOMING, *Complainant*,

vs.

THE STATE OF COLORADO, *Defendant*.

RETURN OF THE DEFENDANT THE STATE OF COLORADO TO THE RULE TO SHOW CAUSE ENTERED MARCH 4, 1940.

RALPH L. CARR,
Governor of the State of Colorado,

CLIFFORD H. STONE,
JEAN S. BREITENSTEIN,
Special Counsel for the State of Colorado.

CLARK QUICK-PRINTING CO., LAWRENCE 1332-34, DENVER, COLO.

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To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

The state of Colorado, a state of the union of the United States of America, appearing in her capacity as such state by Ralph L. Carr, her governor and chief executive, hereby shows cause in response to the rule entered by this Court on March 4, 1940, and says:

I.

Section 2, Article IV, of the constitution of the state of Colorado provides:

> "The supreme executive power of the state shall be vested in the governor who shall take care that the laws be faithfully executed."

Ralph L. Carr, the governor of the state of Colorado, by his executive order dated March 20, 1940, removed Byron G. Rogers, attorney general of the state of Colorado, as the duly accredited representative of the state of Colorado in this cause. A copy of such order is attached hereto as Exhibit "A" and by this reference is made a part hereof.

II.

The State Engineer of the state of Colorado is the duly constituted and authorized official in the state of Colorado having general supervising control of public waters of the state.

III.

After the decree of this Court dated June 1, 1936, and until September 15, 1938, the enforcement thereof was held in abeyance pending the filing of a petition for rehearing in said cause by the state of Colorado, the time for the filing such petition for rehearing having been extended until said date with the express consent of the state of Wyoming. The meadowland appropriators referred to in the decisions and decrees of this Court, with the knowledge and consent of the state of Wyoming and her officials were permitted during said period to divert, and did divert, water from the stream in accordance with the statutes of the state of Colorado and adjudication decrees of the Colorado District Court, as had been their custom and practice for over fifty years. Prior to the irrigation season of 1937, in accordance with an understanding between water officials of the states of Wyoming and Colorado seven Parshall measuring flumes equipped with automatic meas-

uring devices were installed at representative headgates diverting water from the Laramie River for the irrigation of meadowlands, so that a joint study could be made as to the use of water for the irrigation of said meadowlands. This study disclosed that during the 1937 irrigation season, approximately ten (10) acre feet of water was diverted through said test headgates for the irrigation of each one (1) acre of meadowland. Prior to the 1939 irrigation season, at the request of the state of Wyoming, the meadowland appropriators by the direction of the Colorado State Engineer, installed measuring devices at the headgates of all ditches diverting water from the Laramie River for the irrigation of meadowlands. Said devices were not automatic and required daily inspection to determine the amount of water diverted. These devices were installed on sixty-one (61) ditches over an area approximately twenty-seven (27) miles in length.

On or about the 24th day of September, 1938, Adelrick Benziger, the owner of a meadowland appropriation in Colorado from the Laramie River, brought suit on behalf of himself and all other persons similarly situated against the owners of the transmountain diversion ditches from the Laramie River (referred to in the decisions of this Court as the Sky Line Ditch, the Wilson Supply Ditch and the Laramie-Poudre tunnel), and the Colorado water officials for a declaratory judgment and injunction. Said action was brought in the District Court of Larimer County, Colorado, the proper court for the adjudication of water rights in Colorado Water District No. 48, wherein the diversions in question were made, said suit being No. 7897 on the docket of said Court. In said suit the plaintiff contended that the decisions and decrees of this Court in the two cases of Wyoming v. Colorado, made an equitable apportionment to Colorado of 39,750 acre feet per annum of the water of the Laramie River, and that the Colorado laws and adjudication decrees operated to divide this water among the Colorado water users. The defend

ants contended that said decrees and decisions of this Court made a specific allotment to each of the transmountain diverters and to the meadowland diverters and that the adjudication decrees of the Colorado District Court were modified both in amounts and priorities by such specific allotments. As of February 2, 1939, the District Court of Larimer County, Colorado, entered in said case its findings and decree, a copy of which marked Exhibit "B" is attached hereto for reference and greater certainty. By said findings and decree the Court found and adjudged that the decrees and decisions of this Court made a mass allocation to Colorado of 39,750 acre feet per annum of water from the Laramie River, and that the Colorado appropriators of water from said stream could divert in accordance with their state decrees until said total amount of 39,750 acre feet was diverted at the headgates of the Colorado ditches. Said case is now pending in the Colorado Supreme Court on writ of error.

During the 1939 irrigation season the Colorado water officials administered the equitable apportionment of the flow of the Laramie River allotted to Colorado by the decisions and decrees of this Court, to-wit 39,750 acre feet per annum, in accordance with the decree of the District Court of Larimer County, Colorado. To administer said stream during the 1939 season the Colorado State Engineer employed additional men to assist the Water Commissioner of the said Water District No. 48. On or about June 18, 1939, a total of 39,750 acre feet of water had been diverted from said stream in Colorado. The State Engineer did then close all of the headgates on said stream in Colorado and did post on such headgates notices reciting that the headgates were closed, "in accordance with the provisions of a decree of the United States Supreme Court in Wyoming v. Colorado; and in accordance with the decree of the District Court of Colorado, Larimer County, Cause No. 7897, entered on the 2nd day of February, A. D. 1939."

At the time of the closing of said headgates, it was evident that without further irrigation, no hay crop could be produced on the Colorado meadowlands which require irrigation until about July 25. The owners of said meadowland appropriations did through their representatives present such situation to the officials of the state of Wyoming and an understanding was reached between said Wyoming officials and the owners of the Colorado meadowland appropriations that the headgates of the meadowland ditches might be reopened for further irrigation. In accordance with such understanding and with the express knowledge and consent of the officials of the state of Wyoming, the meadowland headgates were then reopened and further water diverted from the Laramie River. The facts and circumstances relating to such understanding between the Colorado meadowland appropriators and the state of Wyoming are evidenced by the affidavit of R. M. Leake, Jr., which is attached hereto as Exhibit "C" and by this reference made a part hereof. After the reopening of said meadowland headgates the Colorado transmountain diverters, except the Wilson Supply Ditch, did reopen their headgates and divert further water from the Laramie River, contending that they had the right to do so because the Supreme Court of the United States had made to them specific allotments of water from the said stream, which up to that time they had not received, and further contending that after the plaintiffs in the aforesaid suit in the District Court of Larimer County, Colorado, had violated the decree thereof, no complaint could be made of a violation of such decree by the transmountain diverters. The Wilson Supply Ditch did not reopen its headgate or divert any water after June 18, 1939.

On or about the 1st day of July, 1939, officials of the state of Wyoming conferred with the Governor, the Attorney General and the State Engineer of the state of Colorado. At said conferences the Wyoming officials stated that they had no objection to the reopening of the meadow-

land headgates. Said Wyoming officials did object to further diversions by the Colorado transmountain appropriators.

Attached hereto and by this reference made a part hereof as Exhibits "D" and "E," are the affidavits of Ralph L. Carr, Governor of the State of Colorado, and M. C. Hinderlider, State Engineer of the State of Colorado, as to the facts respecting said conference of July 1, 1939.

On July 13, 1939, the Colorado State Engineer did again close the headgates of all ditches in Colorado diverting water from the Laramie River.

Attached hereto as Exhibit "F," and by this reference made a part hereof, is the affidavit of C. C. Hezmalhalch, Deputy State Engineer of the State of Colorado, as to the facts relative to the installation of measuring devices and the closing of said headgates on June 18, and July 13, 1939.

IV.

Water diverted and taken from the Laramie River in 1939 contrary to the express provisions of the decree of this Court dated June 1, 1936, was so diverted and taken with the express knowledge, consent and acquiescence of the state of Wyoming as recited above. Neither the state of Colorado, nor any of her officials, authorized or directed the diversion or taking of any water from the Laramie River after 39,750 acre feet of water had been diverted from said stream in 1939 at the headgates of Colorado ditches.

V.

The state of Wyoming and her water officials consented to and acquiesced in the reopening of the headgates of the Colorado meadowland ditches, as above stated, because they well knew that neither the state of Wyoming nor her water users would be damaged thereby. The methods of

irrigating meadowlands along the Laramie River in both Wyoming and Colorado have been identical since the settlement of that river valley approximately seventy years ago. To raise hay on the livestock ranches there located it is necessary to keep the plant roots moist for a period of sixty to sixty-five days ending between July 20 and August 1 of each year. This has been accomplished for many years in each state by the flooding of the fields with water diverted from the river. The results of such practice in Wyoming have shown that at least 75% of the water so diverted from the stream returns directly thereto for use downstream. With knowledge of such fact, the state of Wyoming pleaded in its original complaint in this litigation (Vol. 1, page 7, transcript of record) that 75% of the meadowland headgate diversions in Colorado returned to the stream and were available for use in Wyoming, and consented in 1939 to the reopening of the Colorado meadowland headgates.

VI.

The state of Colorado and her officials recognize that her water users under the decisions and decrees of this Court are now limited in the use of water from the Laramie River to headgate diversions of 39,750 acre feet of water per annum. The Colorado local laws apply to the distribution among her water users of the water so allocated. The state of Wyoming, under the allegations of her petition as evidenced by paragraph numbered 9 thereof, seeks to hold the state of Colorado in contempt of this Court only because of the diversion of more than 4,250 acre feet of water alleged to be awarded and set over to meadowland diversions under the decree of this Court of June 1, 1936. By such allegations Wyoming disregards the application of the local Colorado laws regulating the distribution by the state of Colorado among her water users of the equitable apportionment allocated to the state by this Court, and fails to recognize that any excess diversions over 4,250

acre feet by the meadowland appropriators were in accord with their rights under the state laws until June 18, 1939, and thereafter were made with the consent and acquiescence of the water officials of the state of Wyoming.

VII.

The state of Wyoming and her water users suffered no injury from the actions complained of in her petition. This Court has fixed Colorado's equitable apportionment of stream flow at 39,750 acre feet of water per annum and has determined that Colorado may withhold such amount of water from Wyoming and her water users. In her petition Wyoming alleges that the Colorado transmountain appropriators exported a total of 23,517 acre feet of water from the basin. The difference between this amount and 39,750 acre feet, or 16,233 acre feet, was admittedly available to supply the Colorado meadowland appropriations, some of which are senior to all the Colorado transmountain appropriations. In her petition Wyoming further alleges that the Colorado meadowland appropriators diverted a total of 29,025 acre feet of water from the stream. Wyoming by her pleadings in this litigation and by her admissions, as heretofore alleged, has conceded that at least 75% of the meadowland headgate diversions return to the stream and are available for diversion and use in Wyoming. Thus under the allegations of Wyoming's petition and her admissions in this case, a total of 30,773 acre feet of water (23,517 plus ¼ of 29,025) was actually withheld by Colorado from Wyoming, an amount 8,977 acre feet less than this Court has determined to be Colorado's equitable apportionment of the flow of the interstate stream each year.

VIII.

During the 1939 irrigation season the administration of the flow of the Laramie River in Colorado was attended by uncertainty and confusion which arose not only from disputes between Colorado water users and from the asser-

tions by the Colorado transmountain diverters that this Court had specifically allotted to them certain amounts of water but also from the attitude of the officials of the state of Wyoming who consented to and approved of excess diversions through the meadowland headgates after such headgates were closed by the order of the Colorado State Engineer. Notwithstanding such confusion and uncertainty and over the vigorous objections of the Colorado water users the Colorado State Engineer, the responsible Colorado official, did by extraordinary efforts administer the stream flow in accordance with both the decisions and decrees of this Court and the decree of the District Court of Larimer County, Colorado, until the time when the meadowland appropriators did reopen their headgates with the consent and acquiescence of Wyoming officials. Such actions, encouraged by the officials of the state of Wyoming, resulted in such an unusual and difficult situation that the Colorado water officials were in doubt as to the correct procedure. This doubt was further increased by the attitude of the Wyoming officials at the conference of July 1, 1939, hereinbefore mentioned. At no time did the Colorado State Engineer, or anyone acting under him, authorize or acquiesce in any diversions of water from the Laramie River in violation of the decisions and decrees of this Court.

IX.

During the 1940 irrigation season and during all future irrigation seasons the Colorado water officials can and will, unless otherwise ordered by this Court, administer the flow of the Laramie River in Colorado in accordance with the Colorado laws and adjudication decrees up until the time when a total amount of 39,750 acre feet of water measured at the ditch headgates has been diverted from the stream. When such amount has been diverted in any year, the Colorado water officials can and will close the headgates diverting water from said stream and keep such headgates closed during the remainder of such irrigation season.

X.

Colorado denies each and every allegation set forth in the petition of Wyoming and not specifically admitted herein.

XI.

This is a suit between two states of the union in which principles of right and equity shall be applied, having regard to the equal level or plane on which all the states stand in point of power and right under the constitutional system of the United States of America.

XII.

In view of the premises no act of the state of Colorado or of anyone acting under the authority of the state of Colorado constitutes a violation of any decree of this Court or a contempt of this Court.

WHEREFORE, the state of Colorado prays that the rule to show cause entered herein on March 4, 1940, be discharged and that the petition of the state of Wyoming be dismissed.

RALPH L. CARR,
Governor of the
State of Colorado,

CLIFFORD H. STONE,
JEAN S. BREITENSTEIN,
Special Counsel for the
State of Colorado.

STATE OF COLORADO,
CITY AND COUNTY OF DENVER } ss.

RALPH L. CARR, of lawful age, being first duly sworn according to law upon oath deposes and says:

That he is the Governor of the State of Colorado and as such has caused to be prepared the foregoing Return to the Rule to Show Cause Entered by this Court on March 4, 1940, that he has read the foregoing Return and knows the contents thereof, that the facts therein set forth are true as he verily believes.

RALPH L. CARR.

Subscribed and sworn to before me this 22nd day of March, A. D. 1940.

My Commission expires July 26, 1942.

MARIAN L. POWELL,
Notary Public.

EXHIBIT "A."

EXECUTIVE ORDER.

WHEREAS, Written demand has been made by the Governor as the Chief Executive of the State of Colorado, on the Honorable Byron G. Rogers as Attorney General of the State of Colorado, to prepare a return in conformity with said written demand, on behalf of the State of Colorado by Ralph L. Carr, its Governor, in that certain case now pending in the Supreme Court of the United States of America, wherein the State of Wyoming is Complainant and the State of Colorado is Defendant, in which case the Defendant has been required to show cause why that State is not in contempt of the United States Supreme Court by reason of certain alleged violations of an order of that Court, dated June 1, 1936; and

WHEREAS, the Governor has suggested that Byron G. Rogers, as Attorney General, withdraw his appearance in said Court as the representative of the State of Colorado, in the event he is unwilling to so draft said return; and

WHEREAS, said Byron G. Rogers, as Attorney General, has not only refused to draft said answer in conformity with said request, but has refused to withdraw his appearance in said Court;

NOW, THEREFORE, I, Ralph L. Carr, as Governor and the Chief Executive of the State of Colorado, do order that the appearance of Byron G. Rogers, Attorney General, be withdrawn and recalled as the representative of the Defendant in said case and that no pleading, return, brief, or oral argument on the part of said Byron G. Rogers, either personally or as Attorney General, be held or considered as being done on behalf of the Governor of the State of Colorado, or of the State of Colorado, as Defendant; and

IT IS FURTHER ORDERED that the Honorable Clifford H. Stone, an attorney at law of the Bar of the Supreme Court of Colorado and of the Supreme Court of the United States of America, and Director and Attorney for the Colorado Water Conservation Board, be and he hereby is selected, designated and appointed as the attorney for the State of Colorado in said case, with the power and authority to select such legal assistants, counsel and advisors as he may be advised and that the appearance and presentation for filing of briefs, returns and other pleadings in the Supreme Court of the United States of America by him shall be held and be considered as being done for and on behalf of the State of Colorado in said case.

GIVEN under my hand and the Executive Seal this Twentieth day of March, A. D. 1940.

RALPH L. CARR,
Governor of the State of Colorado.

EXHIBIT "B."

STATE OF COLORADO, }
County of Larimer } ss.

IN THE DISTRICT COURT.
No. 7897.

ADELRICK BENZIGER,

Plaintiff,

vs.

THE WATER SUPPLY & STORAGE COMPANY, a corporation, THE TUNNEL WATER COMPANY, a corporation, THE DIVIDE CANAL & RESERVOIR COMPANY, a corporation, M. C. HINDERLIDER as State Engineer of the State of Colorado, and R. A. MOSIER, as Commissioner of Water District No. 48,

Defendants.

DECLARATORY JUDGMENT AND DECREE.

This cause having come on for trial to the Court on Tuesday, the 31st day of January, 1939, the plaintiff appearing in person and by his attorneys, Fancher Sarchet and J. W. Vaughn, the defendants The Water Supply & Storage Company and The Tunnel Water Company appearing by their attorneys, L. R. Temple and Albert P. Fischer, the defendant The Divide Canal & Reservoir Company appearing by Robert G. Smith, its attorney, the defendants M. C. Hinderlider as State Engineer of the State of Colorado and R. A. Mosier as Commissioner of Water District No. 48 appearing in person and by their attorneys, Byron G. Rogers, Attorney General of the State of Colorado, and Shrader P. Howell, Assistant Attorney General of the State of Colorado; and the evidence adduced by the parties hereto having been concluded on the first day of

February, 1939, and the Court having heard said evidence and having read and examined the exhibits introduced by said parties and having heard the arguments of counsel, which were concluded on the 2nd day of February, 1939, and the cause having been continued to this 21st day of February, 1939, for making and entry of decree, and the Court being now sufficiently advised in the premises, DOTH FIND:

I.

That the plaintiff and the defendant corporations are each appropriators of water for the purpose of irrigation out of the Laramie River and its tributaries, said river being an interstate stream which has its source in mountainous country in Larimer County, Colorado, and flows thence in a northerly direction into the State of Wyoming. That all of the territory drained by the said Laramie River and its tributaries in Colorado comprises Water District No. 48 of the State of Colorado, and appropriations of water for irrigation purposes from said river and its tributaries in Colorado and involved in this cause have heretofore been duly adjudicated and decreed by this Court in proceedings under the applicable statutes of the State of Colorado, for the adjudication of priorities to the use of water for irrigation, and that the plaintiff and the defendant corporations are the owners respectively of priorities under said decrees of dates and rate of flow as follows:

Plaintiff, Adelrick Benziger, owner of two ditch priorities: Martin No. 1 priority of date April 20, 1883, for 15.5 second feet; and Martin No. 2 Priority of date April 30, 1887, for 14.5 second feet, for irrigation of native hay meadowland owned by him in the Laramie River valley and adjacent to the Laramie River;

Defendant The Water Supply & Storage Company, owner of Skyline Ditch priority of date August 7, 1891, for 400 second feet, for transmountain diversion to lands outside of the Laramie River watershed;

Defendant The Divide Canal & Reservoir Company, owner of Wilson Supply Ditch, priority of date June 15, 1899, for 288 second feet, for transmountain diversion to lands outside of the Laramie River watershed; and

Defendant The Tunnel Water Company, owner of the Laramie Poudre Tunnel, priority of date August 25, 1902, for approximately 250 second feet, for transmountain diversion to lands outside the Laramie River watershed.

II.

That plaintiff's said two ditch appropriations are among and included in those "certain meadowland appropriations" referred to and involved in the original actions hereinafter mentioned brought by the State of Wyoming against the State of Colorado, in the Supreme Court of the United States. And the said defendants' said several appropriations are the same appropriations referred to and involved in said original actions, and are therein referred to as, "the Skyline ditch appropriations," "the Deadman Creek appropriations," and "the Laramie-Poudre Tunnel appropriation," respectively.

III.

That there are other appropriators of water out of said Laramie River and its tributaries in said Water District No. 48 for irrigation of native hay meadowland owned by them in the Laramie River Valley in Colorado, and adjacent to said river or its tributaries; and of said other appropriators all those hereinafter in this paragraph mentioned own appropriations having priorities decreed in said Water District No. 48 of an earlier date than the said Skyline appropriation and the said appropriations of the other defendants; and all of said meadowland appropriations are among and included in those "certain meadowland appropriations" referred to and involved in said original actions in the Supreme Court of the United States; That in the foregoing respects said meadowland appropriators are

all similarly situated to plaintiff, and plaintiff herein has brought and prosecuted this cause in his own behalf and in behalf of said other meadowland appropriators thus similarly situated. That those appropriators in whose behalf this cause is prosecuted (including plaintiff) are, and own the appropriations listed, as follows:

Name of Present Owner	Name of Ditch	Date of Appropriation	Number of Second Feet
Martin Hohnholz	Mansfield #2	6- 1-80	19.84
Clarence Oviatt	Warren	3-25-81	6.67
Emma Hohnholz	Hance	3-21-81	19.44
Clarence Oviatt	Stuck Creek	4- 1-81	16.12
G. R. Holcombe	Jim Creek	7-10-81	9
Clarence Oviatt	Bliler & Boswell (only as to that portion used in Colorado)	4- 1-82	7.04
Emma Hohnholz	Mansfield	4-20-82	11.61
R. M. Leake, Jr.	Yelton (a joint interest)	7- 1-82	30.14
Adelrick Benziger	Martin #1	4-20-83	15.5
Ralph Tatham and R. M. Leake, Jr.	La Garde	6-10-83	10.33
H. F. Piper	Ward #1	6-15-83	4.25
H. F. Piper	Ward #2	7- 1-83	9.48
R. M. Leake, Jr.	Jimmy Creek	6- 1-84	5.52
H. F. Piper	Trollope	6-15-84	6.89
Adelrick Benziger	Martin #2	4-30-87	14.50
Martin Hohnholz	Grace Creek	4- 1-88	3.07
Louis E. Sholine	Brown Ditch	5-31-90	10.
Kay H. Olson	Lamb	6- 1-90	3.88
R. M. Leake, Jr.	Jimmy Creek Ditch	5- 1-91	

IV.

That all of the irrigated lands of the said meadowland appropriators, including plaintiff, are lands in cattle ranches and are of altitude of approximately 8000 feet

above sea level, and the only crop for which they are adapted is native hay; That for the proper irrigation of said lands it is necessary to keep the same wet by continuously flooding said lands for a period of approximately sixty days during each growing season, commencing about the 25th day of May of each year; that said meadowlands are situated along and adjacent to the main Laramie River or one or more of its tributaries and slope toward said river or tributary. And as heretofore applied on and to the irrigation of said meadowlands, of the waters diverted from the flow of said river system at the headgates of the several ditches under said appropriations, approximately 90% thereof has returned to the said river through percolation and surface return flow, and only the remaining approximate 10% has been actually consumed by the meadow growth and evaporation; and all of such return flow and percolation has been available to ditches having their headgates further downstream, including all appropriators from said river in the State of Wyoming. That the total water diverted during each year under the said meadowland appropriations herein before listed (and exclusive of other meadowland appropriation not herein listed, but which are included in those "certain meadowland appropriations" mentioned in the said Supreme Court actions), at the headgates of said listed ditches has been approximately 25,600 acre feet, of which approximately 90% has returned to the stream flow for the benefit of diversions lower downstream, including the State of Wyoming. And that until the situation now confronting the water users and appropriators in said Water District No. 48 arose by reason of the limitations placed upon Colorado and her appropriators of water, under the findings, opinions, and decrees of the Supreme Court of the United States hereinafter mentioned, the natural flow of said Laramie River and its tributaries was and has been sufficient to supply all decreed priorities in said Water District No. 48.

V.

That heretofore those certain original suits involving the appropriations and use of water from said Laramie River, an interstate stream as aforesaid, were brought and prosecuted by the State of Wyoming against the State of Colorado before the Supreme Court of the United States, and the findings, opinions, and decrees of said Supreme Court are officially reported as follows, to-wit:

No. 3 original, October term, 1921, entitled The State of Wyoming v. The State of Colorado, decided June 5, 1922, officially reported in 259 U. S. at page 419 and decree reported in 259 U. S. at page 496. (Also reported in 42 S. Ct. 552 and 594; 66 L. Ed. 999.)

On October 9, 1922, a modified decree was entered in the foregoing cause which is officially reported in 260 U. S. at page 1. (Also reported in 43 S. Ct. 2; 66 L. Ed. 1026.)

No. 15 original, October Term, 1931, entitled The State of Wyoming v. The State of Colorado, decided upon motion to dismiss May 31, 1932, officially reported in 286 U. S. at page 494. (Also reported in 52 S. Ct. 621; 76 L. Ed. 1245.)

No. 10 original, which is the same cause as the foregoing No. 15 original, October Term, 1935, entitled The State of Wyoming v. The State of Colorado, officially reported in 298 U. S. at page 573. (Also reported in 56 S. Ct. 912.) (And decree therein officially reported in ..... U. S. at page ..... Exhibit "E" herein.)

VI.

That in and by said suits the Supreme Court of the United States found, determined, and decreed, as between the two States and their respective appropriators of water from the Laramie River and all its tributaries, excluding Sand Creek, that by reason of prior appropriations by Colorado appropriators, in limits as to quantity of water

and as to dates of appropriation fixed by said Court as between the two States, that there was thereby confirmed and established:

The right of the State of Colorado, or of any one recognized by her as duly entitled thereto, to divert and take within that State a total of 39,750 acre feet in each year (and no more) in virtue of appropriations prior to Wyoming appropriations and in amounts as follows:

(1) 18,000 acre feet of water per annum from the Laramie River and its tributaries in virtue of the Skyline Ditch appropriations;

(2) 4,250 acre feet of water per annum from such stream and its tributaries in virtue of certain meadowland appropriations;

(3) 2,000 acre feet from the headwaters of Deadman Creek, a tributary of the Laramie River, through the Wilson supply ditch;

(4) 15,500 acre feet of water per annum from the Laramie River and its tributaries, in virtue of the Laramie-Poudre tunnel appropriation;

and all remaining waters of said river and its tributaries was thereby confirmed and established in the State of Wyoming and her water claimants. And by further provisions in said decrees the defendant therein, the State of Colorado, was specifically enjoined from diverting or taking any waters in excess of the confirmed rights to 15,500 acre feet and 4,250 acre feet in virtue of Laramie-Poudre Tunnel appropriation and in virtue of the meadowland appropriations, respectively, there being no showing in said suits of any exigency requiring specific injunctions against the State of Colorado respecting the other recognized and accredited diversions by the other defendant corporations herein.

VII.

That from and by reason of said suits, and the said opinions, decrees, and injunctions rendered therein by the Supreme Court of the United States, uncertainties exist and controversies have arisen between the defendants and the plaintiff and the other appropriators in whose behalf this action is brought and prosecuted: The defendant corporations and the defendant water officials contending and construing said Supreme Court decisions and decrees as modifying the adjudication decrees of this Court in the State of Colorado as pertain to said Water District No. 48, and in effect nullifying said state decrees by adjudicating amounts and priority of right as between the defendant corporations and the meadowland appropriators, irrespective of the adjudications in this Court and the priorities as decreed in this Court; and the plaintiff, for himself and others similarly situated, contending and construing said Supreme Court decisions and decrees as limiting Colorado's use of said river waters in a total allocation as between the states, and contending that the meadowland appropriations should be first satisfied according to their priorities to the extent of such total allocation, whereby only the remaining water accredited to Colorado would be available to the defendant corporations under their junior appropriations. Wherefore, to remove such uncertainty and terminate such controversy, this Declaratory Judgment and Decree is proper and necessary to declare the status and rights of the parties hereto, and to direct a proper administration of the diversion of waters in Water District No. 48 for irrigation.

VIII.

That said defendant corporations assert the right to divert and take and unless enjoined and restrained will, if water is available, divert and take each year from the Laramie River and its tributaries a total of 35,500 acre feet of water; that the defendant The Water Supply &

Storage Company asserts the right to divert and take and will divert and take, unless enjoined from so doing, each year 18,000 acre feet of water; that the defendant corporation The Tunnel Water Company asserts the right to divert and take, and will divert and take, unless enjoined from so doing, each year 15,500 acre feet of water; that the defendant The Divide Canal & Reservoir Company asserts the right to divert and take, and will divert and take, unless enjoined from so doing, each year 2,000 acre feet of water; that the defendant M. C. Hinderlider, as State Engineer of the State of Colorado, proposes and asserts that he will, beginning in April of the present year, unless enjoined and restrained from so doing, administer the distribution of the water of the said Laramie River and its tributaries by permitting each defendant corporation to take each year the several amounts above stated, making said total of 35,500 acre feet, without regard to priorities as determined by Colorado decrees; and that he will distribute only the remaining 4,250 acre feet of the total accord or mass allocation to the ranchers in said Water District, measured at the headgates; that the situation thus disclosed renders the plaintiff and said other persons similarly situated insecure in their rights, will lead to a multiplicity of suits, and there is no adequate remedy at law in the premises, and this is a proper case for injunction.

The Court Doth Further Find and Declare:

IX.

That said original suits in the Supreme Court of the United States were of nature between the two states, and the decisions therein were intended to, and did, determine only the relative rights of the two states to divert and take the waters of the Laramie River and its tributaries; and the question of priority in time and right of the appropriations were therein dealt with and resolved and decreed only as between the two states; and it was not the purpose of said suits or of the opinions and decrees entered therein

to withdraw said appropriations and water claims from the operation of the local laws of Colorado, or to restrict their utilization in any way not affecting the rights of the State of Wyoming and her water claimants. That the fixing therein of the meadowland appropriations and enjoining any diversion and taking in excess thereof in virtue of such appropriations was and is, and was intended to be, only as between the two states, and not an adjudication or re-adjudication of the relative rights of the owners of the decreed appropriations in said Water District No. 48 in the State of Colorado; and that the relative rights of all of the owners of all of said decreed appropriations in the State of Colorado as to priority in time and right—and amount, so long as the aggregate of water diverted does not exceed the total of 39,750 acre feet accredited to Colorado appropriations, exclusive of diversions from Sand Creek or its tributaries—are subject to the constitution and laws of the State of Colorado and to the decrees heretofore entered in this Court in adjudication proceedings for said Water District No. 48.

X.

That the plaintiff and other meadowland appropriators and the defendant appropriators are entitled to divert and take water for irrigation from the Laramie River and its tributaries, through properly installed headgates in their respective ditches, according to their respective priorities in time and right as fixed by the adjudication decrees of this Court for Water District No. 48, until the total so diverted and taken by all such appropriators in each year shall equal in the aggregate the amount of 39,750 acre feet from the Laramie River and its tributaries, excluding Sand Creek; and the water officials have the duty so to administer said water. Provided, in addition to the division and measurement of said waters as heretofore by cubic feet of flow per second of time, the total diversion at the headgates in acre feet is to be determined and recorded to the end that the total amount allocated to Colorado may not

be exceeded. And provided further, since by the limitations now placed upon the State of Colorado no credit is given for return waters from diversions made by the meadowland appropriators in said Water District and all such return waters are lost to Colorado's allocation, the permitting of any unnecessary return to the stream of diverted and measured water shall be deemed waste and, as such, prohibited by the adjudication decrees of this Court.

It is Therefore Ordered and Decreed:

That in the administration of the distribution of water of the Laramie River and its tributaries in Water District No. 48 in the State of Colorado, the parties hereto shall proceed in accordance with the foregoing findings, declarations, and directions and in conformity with the Constitution and laws of the State of Colorado, under the decrees of this Court pertaining to said Water District No. 48 and upon the recognized practice of administration applied to all streams in Colorado, whereby each ditch be permitted to divert each day under its decree in accordance with date of priority. When 39,750 acre feet of water have been diverted by all the decrees exclusive of those from Sand Creek and its tributaries, all headgates are to be closed for the balance of the season.

It is further ordered, adjudged, and decreed that in the administration of the distribution of water under the decreed priorities of said Water District No. 48, all of said opinions and decrees of the Supreme Court of the United States shall be considered together and as a total limitation and mass allocation to Colorado of 39,750 acre feet annually from the waters of said river and its tributaries, exclusive of Sand Creek, and that the amount taken and distributed any year shall be measured and shall not exceed such total of 39,750 acre feet measured at the headgates, so long as said limitation continues to exist.

It is further ordered, adjudged, and decreed that the plaintiff appropriators and said defendant corporations

and each of them is enjoined and restrained from taking water from said river and its tributaries excepting as herein limited and directed; and that the defendant M. C. Hinderlider as State Engineer of the State of Colorado and all of his subordinate officers, including the defendant R. A. Mosier as Water Commissioner of said District No. 48, be and that each of them is hereby enjoined and restrained from administering the distribution of water in said Water District No. 48 otherwise than as herein directed and decreed.

It is further ordered, adjudged, and decreed that the defendant corporations herein pay the costs herein taxed and to be taxed.

Done in open court this 21st day of February, 1939, as of date February 2, 1939.

By the Court:

CLAUDE C. COFFIN, Judge.

EXHIBIT "C."

STATE OF COLORADO, }
COUNTY OF LARIMER } ss.

R. M. LEAKE, JR., of Larimer County, Colorado, Post Office Address, Jelm, Wyoming, being first duly sworn deposes and says:

That he is now and at all of the times hereinafter mentioned was the owner of a cattle ranch located on the Laramie River in said County and State; that he resides upon said ranch and operates the same; that certain decreed priorities of water from the said Laramie River are appurtenant to said ranch and continuously for a period of many years last past have been used to irrigate the hay meadows of said ranch; that he is the secretary of an organization known as the Upper Big Laramie River Water Users Association; that said association was formed

for the mutual benefit and protection of the owners of all lands in Larimer County, Colorado, irrigated from the waters of the Laramie River and its tributaries under and in virtue of certain Colorado decreed priorities of water, and that the members of said association are all owners of land in said County and State irrigated from the waters of said river and its tributaries.

Affiant refers to the decree of the Supreme Court of the United States No. 10 original, October Term, 1935, of date June 1, 1936, in re: The State of Wyoming, complainant vs. The State of Colorado, in equity. The ranches located in the valley of the said Laramie River in Colorado are the only lands in Colorado irrigated directly from said River and its tributaries; that practically all of the meadowlands of said valley are irrigated under decreed priorities of early date, beginning with June 1, 1880, and ending with May 1, 1891, and that prior to the beginning of the irrigation season of the year 1937, no adequate measuring devices were ever used to determine the amount of water taken from said river and its tributaries for the irrigation of said meadows. That after June 1, 1936, by common consent of the states of Wyoming and Colorado said ranches were irrigated without any measurement of the water until the beginning of the irrigation season of the year 1937, at which time the two states selected seven representative ditches in which measuring devices were installed for the purpose of determining the amount of water required to irrigate said meadowlands; and that in the year 1939 under the supervision of the two states measuring devices were installed in all of the ditches used for the irrigation of said meadowlands. In the years 1938 and 1939 water was applied to the meadows strictly in accordance with the Colorado decreed priorities appurtenant to said meadows and in the same manner it had been applied for a period of more than fifty years, and the measurements made in the two states in the seven test ditches in the year 1938 and the measurements made in the year 1939 disclose the fact

that the water so used upon said meadowlands during the irrigation season aggregated more than 40,000 acre feet. After June 1, 1936, by new experiments, new devices, more critical observation, and more accurate calculation, it was determined to a practical certainty that fully 90% of the water so applied to said meadows flows directly back into the river.

That on February 2, 1939, in the District Court of Larimer County, Colorado, in a suit in which Adelrick Benziger, representing himself and all others similarly situated, was plaintiff, and the Water Supply and Storage Company and other transmountain diversion ditch companies were defendants, it was ordered, adjudged, and decreed by the Court, among other things, "when 39,750 acre feet of water have been diverted by all the decrees * * * all headgates are to be closed for the balance of the season." The decrees referred to applied to all of the ditches, transmountain diversion as well as meadowland, taking water from the Laramie River and its tributaries. During the entire irrigation season of the year 1939, Mr. Ben Le Vasseur, Deputy State Engineer of the State of Wyoming, was on the Laramie River in Larimer County, Colorado, in charge of the affairs of the State of Wyoming in connection with the distribution of the said waters between the two states.

On May 22, 1939, affiant as secretary of said Water Users Association wrote the following letter to Mr. Le Vasseur:

Mr. Ben Le Vasseur:
Special Hydrographer for the State of Wyoming
Glendevy, Colorado

Dear Mr. Le Vasseur:

As secretary of the Upper Big Laramie River Water Users Association, I wish to ask you whether or not the State of Wyoming is going to request the ranchers in the valley to quit running their water under their Colorado

decreed appropriations at the time the 39,750 acre feet alloted to Colorado shall have been used. Under the declaratory judgment and decree of the District Court of Larimer County, Colorado, as of date February 2, 1939, in which Adelrick Benziger is plaintiff and the Water Supply and Storage Company, Divide Canal and Reservoir Company, Tunnel Water Company, M. C. Hinderlider as State Engineer of the State of Colorado, and R. A. Mosier as Water Commissioner of Water District No. 48, are defendants, among other things it was ordered: "That said decrees of the Supreme Court of the United States shall be considered together and as a total limitation and mass allocation to Colorado of 39,750 acre feet annually from the waters of said river and its tributaries, and that the amount taken and distributed (by Colorado) any year shall be measured and shall not exceed such total of 39,750 acre feet measured at the headgates, so long as said limitation continues to exist." As we all know, the 39,750 acre feet will soon be gone.

The members of the association which I represent all own ranches in the Laramie River Valley in Larimer County, Colorado, and decreed appropriations for the irrigation of the meadows located on said ranches and of course, will not raise hay crops unless the State of Wyoming is kind enough to permit them to continue to use their appropriations as they have done in past years. Of course, you and all of the other Wyoming officials know that the valley is narrow; that the consumptive use of the water is small; and that approximately 90% of the water used in irrigating the meadows finds its way back into the Laramie River within a short time and is thereafter available to the Wyoming water users. We realize that failure on the part of Wyoming to demand that we close our headgates or any other consent by Wyoming whether explicit or tacit to the effect that we may continue to use the water, is a mere license on the part of Wyoming for us to use her water, and that the same could be revoked at any time.

However, we feel certain in this position: That after the 39,750 acre feet has been used and all headgates are closed under the decree of the District Court of Larimer County, that the Colorado water officials will have nothing further to say concerning the use of the water which under the United States Supreme Court decrees belongs to the State of Wyoming, and that if we can have some word from the State Engineer of Wyoming through you or otherwise to the effect that no demand will be made by Wyoming for us to close our headgates, that we are then at liberty to continue to run water on our meadows through our ditches.

If you will get some word to us within the next week or ten days, you may be assured every member of our association will greatly appreciate the favor.

May 22, 1939
Very truly yours,
R. M. Leake, Jr., Sec.

Thereafter and on to-wit, the 6th day of June, 1939, affiant received a reply to said letter from Mr. Le Vasseur as follows, towit:

Jelm, Wyoming
June 5, 1939

Mr. R. M. Leake, Jr.
Sec. Upper Big Laramie River Water User's Asso.
Jelm, Wyoming

Dear Mr. Leake:

Upon receipt of your letter of May 22, 1939, I wrote to the Wyoming State Engineer, Mr. L. C. Bishop, and told him of your question concerning whether or not Wyoming would demand a regulation of the Upper Laramie ditches belonging to the valley ranchers after the 39,750 acre-feet allowed Colorado by the Court decree has been used.

At this time, my orders are not to demand such a regulation, and it doesn't seem probable that Wyoming will

demand a regulation of rights on the Laramie River where it will receive the benefit of the return flow.

Very truly yours,

Ben Le Vasseur,
Special Hydrographer.

BL:ml

Thereafter and on June 10, 1939, said Upper Big Laramie River Water Users Association held a meeting at which a motion was made and unanimously carried; that accurate minutes were kept of the proceedings of said meeting, and the following is an exact copy of said minutes:

"That at the meeting of the Upper Big Laramie River Water Users' Association, all but two members present. That the attorney of the Association is present. That the meeting is called for the purpose of discussion of the decree of the District Court of Larimer County of date Feb. 2, 1939. That an open, full, and complete discussion was engaged in by all the members present and their attorney. At the conclusion of the discussion it was moved and seconded and unanimously carried that when the 39,750 acre feet alloted to Colorado shall have been used and the ranchers are so notified by the water officials of Colorado, and further notified to close their headgates, that said headgates shall forthwith be closed.

"It was further moved, seconded and unanimously carried that in view of the fact that the decree of the District Court of Larimer County provides that only 39,750 acre feet of water shall be used by Colorado, 'so long as said limitation continues to exist'; and in view of the further fact that the State of Colorado will have no further jurisdiction over the waters of the Laramie river and its tributaries after the 39,750 acre feet has been used and said headgates have been closed, and in view of the further fact that our association is in receipt of a letter from a water official of the State of Wyoming to the effect that Wyoming

will not demand that the ranchers of the Laramie River valley be required to keep headgates closed, our said association now moves that after said headgates have been closed under the direction of the Colorado water officials, that they again will be opened and kept opened and the water used until we are notified by the State of Wyoming to close them. And our association further unanimously resolves that the interpretation of said decree of February 2, 1939, permits such action."

R. M. Leake, Jr., Sec.

That the said Ben Le Vasseur was present at said meeting of June 10, 1939, approved of said action, and was the only Wyoming official in charge of the affairs and the business of Wyoming in Colorado in connection with the distribution of said water during the irrigation season of 1939. Thereafter the Attorney General of the State of Wyoming was informed by word of mouth and also by letter of the said proceedings of said association.

Affiant further says that when the Laramie River ranchers were requested by the officials of the State of Wyoming to close their headgates each and every meadowland headgate was immediately closed and has never since been opened. Affiant further says that no request was ever made by any citizen of the State of Wyoming or any person for and on behalf of the State of Wyoming to close said headgates excepting by the State Engineer of Wyoming, and that as heretofore affirmed said request was immediately complied with.

The affirmations hereof concerning the correspondence with Wyoming officials, the minutes of said association and the things occurring at the said meeting of said association are with affiant's own personal knowledge. The remaining affirmations hereof are matters of common knowledge.

R. M. Leake, Jr.

Subscribed and sworn to before me this 15th day of March, 1940.

My Commission Expires Sept. 15, 1940.

FRANK W. MOORE,
Notary Public.

(The original of this affidavit has been filed with the Clerk of this Court.)

EXHIBIT "D."

AFFIDAVIT OF RALPH L. CARR.

STATE OF COLORADO, }
CITY AND COUNTY OF DENVER } ss.

RALPH L. CARR, of lawful age, being first duly sworn upon his oath deposes and says:

That he is now and for more than fourteen months last past has been the duly elected, qualified and acting Governor of the State of Colorado; that on, to-wit, Saturday, the first day of July, A. D. 1939, a group of men came to his office in the State Capitol Building in the City and County of Denver, State of Colorado, to discuss certain questions regarding the administration of the flow of the Laramie river in the State of Colorado, in so far as said administration came within the terms of certain decrees of the Supreme Court of the United States and of the District Courts of Colorado; that among the persons who came to his office were the Honorable Ewing T. Kerr, Attorney General of Wyoming; Mr. L. C. Bishop, State Engineer of Wyoming; Honorable M. C. Hinderlider, State Engineer of Colorado; Honorable Byron G. Rogers, Attorney General of Colorado; Lawrence Temple and Fancher Sarchet, both of Fort Collins, Colorado, and the Honorable Robert Smith of Greeley, Colorado, all of said three last named persons being attorneys for parties interested

in water appropriations in Colorado; as well as other persons who are not now recalled by your affiant.

During the conference in the office of affiant questions arose as to the amount of water diverted or which might be diverted out of certain ditches known as the transmountain diversion ditches and certain other ditches called the meadowland ditches, and that in response to questions asked by your affiant and also by State Engineer Hinderlider of the State of Colorado, Attorney General Kerr and State Engineer Bishop of Wyoming both stated expressly in the presence of affiant and the other persons that, although vastly more than four thousand two hundred fifty acre feet of water had already been diverted through such structures from the river, they had no objection to continued diversions being made through the meadowlands ditches for the reason that a great portion of all of the water so diverted returned to the Laramie river to be used downstream by water appropriators within the State of Wyoming; that said State Engineer Bishop of Wyoming then stated that in his opinion at least seventy-five to eighty-five per cent. of all diversions into said meadowlands ditches in Colorado returned to the Laramie river and became available for use by Wyoming and her appropriators; that the only objections presented by either of said officials to diversions in Colorado related to the transmountain ditches aforesaid.

Further affiant saith not.

RALPH L. CARR.

Subscribed and sworn to before me this 21st day of March, A. D. 1940.

My Commission expires July 26, 1942.

MARIAN L. POWELL,
Notary Public.

The original of this affidavit has been filed with the Clerk of the Supreme Court of the United States.

EXHIBIT "E."

AFFIDAVIT OF M. C. HINDERLIDER.

STATE OF COLORADO, }
CITY AND COUNTY OF DENVER } ss.

M. C. HINDERLIDER, of lawful age, being first duly sworn upon his oath deposes and says that he is now and for many years last past has been the duly appointed, qualified and acting State Engineer of the State of Colorado; that on to-wit Saturday, July 1, A. D. 1939, this affiant attended a protracted conference respecting the administration of the waters of the Laramie River within the purview of the decree of the Supreme Court of the United States and the decree of the District Court of Colorado respecting said waters; that among others there were present at said conference Honorable Ewing T. Kerr, Attorney General of Wyoming, and Mr. L. C. Bishop, State Engineer of Wyoming, Governor Carr of Colorado, Attorney General Rogers of Colorado, and Attorneys Temple, Smith, Sarchet, and others, representing certain of the water users involved. That the only protest made by Wyoming officials on said occasion, was respecting the so-called Trans-Mountain Diversions, notwithstanding the fact that at said time said Trans-Mountain Diversions had not nearly equaled the allotments indicated by the decree of the Supreme Court of the United States; that both Messrs. Kerr and Bishop, representing Wyoming, expressly stated, not only to this affiant but to the conference generally, that they had no objection so ever to continued diversions as respects the Meadowland appropriations—those involved in the decree of June 1, A. D. 1936 in the Supreme Court of the United States; that at the time of said conference vastly more than 4250 acre feet had been diverted by said Meadowland appropriators, or approximately 20,000 acre feet, but notwithstanding which it was repeatedly stated by both Messrs. Kerr and Bishop that

further diversions by said Meadowland appropriators were not and would not be objected to; that State Engineer Bishop of the State of Wyoming stated that in his opinion at least 75% of said Meadowland diversions were returned to the Laramie River and hence became subject to Wyoming's use. That as hereinbefore stated the only objections voiced by either Attorney General Kerr or State Engineer Bishop of Wyoming related to the Trans-Mountain Diversions. Further affiant sayeth not.

M. C. HINDERLIDER.

Subscribed and sworn to before me this 18th day of March, A. D. 1940.

My commission expires July 6, 1942.

ANN G. LANDY,
Notary Public.

The original of this affidavit has been filed with the Clerk of the Supreme Court of the United States.

EXHIBIT "F."

AFFIDAVIT OF C. C. HEZMALHALCH.

STATE OF COLORADO, }
} ss.
CITY AND COUNTY OF DENVER }

C. C. HEZMALHALCH, being first duly sworn upon his oath, deposes and says, that he is now and ever since the year 1924 has been the duly appointed, qualified and acting Deputy State Engineer of the State of Colorado.

That in the spring of the year 1937, and prior to the opening of the irrigation season, the State of Colorado, under the direction of the State Engineer's office, and pursuant to an agreement with the water officials of the State of Wyoming, installed on seven representative ditches in the Laramie River Basin in Colorado, Parshall

Measuring Flumes for the purpose of determining the average diversion of water for the irrigation of hay meadows in the State of Colorado, from the Laramie River; and that said flumes were operated during the entire irrigation season of 1937 with automatic recording gages. That the information obtained from such records in the year 1937 was made available to the water officials of the State of Wyoming.

That in the spring of 1939, and prior to the diversion of any water from the Laramie River and its tributaries in the State of Colorado, the State Engineer of the State of Colorado caused to be installed suitable measuring devices on all of the ditches diverting water from the Laramie River and its tributaries in the State of Colorado. Further, that the State Engineer caused to be employed four Special Deputy State Engineers in addition to the duly qualified and acting Water Commissioner of Water District No. 48, comprising the Laramie River drainage in the State of Colorado, for the purpose of determining the amount of water diverted from the Laramie River and its tributaries in the State of Colorado.

That during the irrigation season of the year 1939 one Ben LeVasseur, a Deputy State Engineer of the State of Wyoming, was engaged on the Laramie River and its tributaries in the State of Colorado in making observations of the operation of the said measuring devices for the State of Wyoming.

That since the year 1922 there has been installed, and in operation an automatic recording device on the Laramie-Poudre Tunnel, and since the year 1923 on the Skyline Canal, and since the year 1935 on the Wilson Supply System, all of which divert water from the Laramie River basin into the Cache la Poudre River drainage basin in Colorado; and that ever since the installation of such devices the records therefrom have been preserved in the office of the State Engineer of Colorado, and at all times

have been made available to the Water Officials of the State of Wyoming.

That during the year 1939 the State Engineer's office administered the diversions of water from the Laramie River in Colorado in accordance with the decrees of the District Court of said State, and operated the said measuring flumes and automatic recording devices during said season with the intention and purpose of closing all headgate diversions when the total allocation made by the Supreme Court of the United States, in the amount of 39,750 acre feet, had been diverted. That affiant received frequent reports from the Water Commissioner, and Special Deputies engaged in the work on the Laramie River in Colorado as to the total amount of water diverted in the State of Colorado, so as to determine when the total amount of 39,750 acre feet had been diverted. That on the 16th day of June, 1939, affiant determined and found that within two or three days the total amount of 39,750 acre feet of water allocated to the State of Colorado would be diverted and thereupon went to the Laramie River Basin, and on the 18th of June, 1939, determined that the 39,750 acre feet had been diverted and proceeded to close all diversions from the Laramie River and its tributaries in Colorado; and each headgate through which water was diverted from the Laramie River, or its tributaries, was closed by a representative of the State Engineer's office, and there was posted thereto the following notice:

"Notice.

"..... Ditch

"This headgate has been closed by me this..... day of.....A. D. 19....., in accordance with provisions of a decree of the U. S. Supreme Court in Wyo. v. Colo.; and in accordance with decree of the District Court of Colorado, Larimer Co., Cause No. 7897 entered on the 2nd day of February, A. D. 1939.

"Further diversions by this ditch during the current year are enjoined by Court decree.

(Signed) R. A. Mosier,
Water Commissioner,
District No. 48."

That thereafter affiant was informed that the headgates in Colorado diverting water from the Laramie River were reopened and again on the 12th of July, A. D. 1939, he went to the Laramie River, and with the assistance of the Water Commissioner of said District No. 48, again closed all of the headgates in Colorado through which water was diverted from said River.

C. C. Hezmalhalch.

Subscribed and sworn to before me this 21st day of March, A. D. 1940.

Ann G. Landy,
Notary Public.

(Notarial Seal)

Ann G. Landy,
Notary Public.

My commission expires July 6, 1942.

The original of this affidavit has been filed with the Clerk of the Supreme Court of the United States.

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In the
Supreme Court of the United States

October Term, 1935

In Equity

No. 10, Original

THE STATE OF WYOMING, *Complainant,*)
vs.
THE STATE OF COLORADO, *Defendant.*)

AFFIDAVITS SUBMITTED ON BEHALF OF THE STATE OF WYOMING

EWING T. KERR,
Attorney General of the State of Wyoming

HAROLD I. BACHELLER,
Deputy Attorney General

ARTHUR KLINE,
Assistant Attorney General.

Solicitors for Complainant, the State of Wyoming

WYOMING LABOR JOURNAL

In the
Supreme Court of the United States

October Term, 1935

In Equity

No. 10, Original

THE STATE OF WYOMING,)
Complainant,)
vs.)
THE STATE OF COLORADO,)
Defendant.)

AFFIDAVITS SUBMITTED ON BEHALF OF THE STATE OF WYOMING

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

The State of Wyoming, by Ewing T. Kerr, Attorney General of the State, under the direction of the Honorable Nels H. Smith, Governor of the State, and in compliance with the request of the Honorable L. C. Bishop, State Engineer of the State and her Commissioner charged with authority in relation to interstate streams, asks leave of Court to submit herewith affidavits of L. C. Bishop, State Engineer, and Ewing T. Kerr, Attorney General, and respectfully requests that said affidavits be taken and considered by this Honorable Court as counter-affidavits to the affidavits submitted by the State of Colorado in her return filed with this Honorable Court on March 25, A. D.

1940, wherein certain officials of the State of Colorado, together with other persons, made affidavits, which are submitted as exhibits in said return, alleging that officials of the State of Wyoming consented to excessive diversions over and above the 39,750 acre feet of water from the Laramie River within the State of Colorado.

Reference is hereby made to the petition for rule to show cause filed herein by the State of Wyoming and more specifically to Exhibit "B" of said petition appearing on page 15 thereof.

AFFIDAVIT OF L. C. BISHOP

THE STATE OF WYOMING)
)ss.
COUNTY OF LARAMIE)

L. C. BISHOP, being first duly sworn upon his oath, according to law, deposes and says:

That he is, and has been, since the 1st day of April, A. D. 1939, the duly appointed, qualified and acting State Engineer of the State of Wyoming, and the Commissioner charged with authority in relation to interstate streams;

That on the 23rd day of June, A. D. 1939, affiant, having received information that water was being illegally taken from the Laramie River in the State of Colorado in excess of 39,750 acre feet, telephoned to M. C. Hinderlider, State Engineer of the State of Colorado, and protested the diversions of said water in excess of said 39,750 acre feet and was assured by said Hinderlider that said headgates on said Laramie River in Colorado would be closed forthwith by said Hinderlider; that thereafter af-

fiant, having received information that said headgates were not closed, sent the following telegram to M. C. Hinderlider, State Engineer of the State of Colorado, on the 29th day of June, A. D. 1939:

"M. C. Hinderlider
State Engineer
Capitol Building
Denver, Colorado

On June 28 Laramie Poudre Tunnel was flowing 65.9 second feet, Skyline Ditch flowing 104.6 second feet. On June 27 Dead Man Ditch flowing 3.3 second feet. Investigation disclosed all meadow land ditches were diverting. Wyoming demands that Laramie Poudre Tunnel, Skyline Ditch, Dead Man Ditch and all meadow land diversions cease forthwith. Advise immediately if this will be done. Would like to have conference with you and Attorney General Saturday morning at ten.

L. C. Bishop,
State Engineer."

Affiant, in company with Ewing T. Kerr, Attorney General of the State of Wyoming, conferred with Colorado officials on the 1st day of July, A. D. 1939, at which time said officials protested in person to Colorado officials against the illegal diversion of water from the Laramie River by the State of Colorado.

That there were present at said conference, Ralph L. Carr, Governor of Colorado, Ewing T. Kerr, Attorney General of Wyoming, M. C. Hinderlider, State Engineer of Colorado, Byron G. Rogers, Attorney General of Colo-

rado, Lawrence Temple and Fancher Sarchet, both of Fort Collins, Colorado, and Ralph Smith of Greeley, Colorado.

That affiant, with Ewing T. Kerr, Attorney General of Wyoming, had requested said conference with said officials of the State of Colorado and other persons interested in water appropriations in Colorado for the purpose of protesting the re-opening of the diversion headgates and diverting water therefrom in excess of the amount allowed to the State of Colorado by the Supreme Court of the United States; that affiant insisted, on this occasion, that the officials of the State of Colorado again close the headgates of said diversions within the State of Colorado and keep said headgates so closed during the remainder of the irrigation season; that officials of the State of Colorado, and other persons interested in water appropriations in Colorado, refused to close said headgates and so advised affiant that they would continue to take water through said diversions notwithstanding the fact that they were exceeding the amount of 39,750 acre feet.

That affiant did not, at any time, consent to the Meadowland appropriators continuing to divert water from the Laramie River in the State of Colorado after the total amount of 39,750 acre feet of water had been diverted from the said Laramie River in the State of Colorado.

Affiant further states that, as State Engineer of the State of Wyoming, he has the custody and control of all the records of water diversions on the Laramie River and that the records of his office show that from June 18 to August 30, 1939, the State of Colorado permitted the diversion of 16,599 acre feet of water over and above the total allocation of 39,750 acre feet of water.

Affiant further states that the 16,599 acre feet diverted by the State of Colorado after June 18, 1939, to and includ-

ing August 30, 1939, was made over the strenuous objection and protest of affiant in behalf of the State of Wyoming.

Further affiant sayeth not.

L. C. BISHOP

Subscribed in my presence and sworn to before me this 28th day of March, A. D. 1940.

RUBY B. SALYER

(SEAL) *Notary Public.*

My commission expires March 25, 1943.

AFFIDAVIT OF EWING T. KERR

THE STATE OF WYOMING)
)ss.
COUNTY OF LARAMIE)

EWING T. KERR, being first duly sworn upon his oath, according to law, deposes and says:

That he is, and has been, since the 2nd day of January, A. D. 1939, the duly appointed, qualified and acting Attorney General of the State of Wyoming.

That on or about the 23rd day of June, A. D. 1939, affiant, having received information that water was being illegally taken from the Laramie River in Colorado in excess of 39,750 acre feet, telephoned the Honorable Byron G. Rogers, Attorney General of the State of Colorado, at Grand Junction, Colorado, and protested the diversions of said water in excess of said 39,750 acre feet and was assured that upon his (Mr. Rogers') return to Denver the matter would be discussed with the officials of the State of Colorado with the view of closing the headgates.

That heretofore, to-wit, on the 1st day of July, A. D. 1939, affiant, in company with L. C. Bishop, State Engineer of the State of Wyoming, met with state officials of the State of Colorado and other persons interested in water appropriations in the State of Colorado; that at said meeting, which was held in the office of the Governor of the State of Colorado, there were present Ralph L. Carr, Governor of Colorado, M. C. Hinderlider, State Engineer of Colorado, Byron G. Rogers, Attorney General of Colorado, Lawrence R. Temple and Fancher Sarchet, both of Fort Collins, Colorado, and Ralph Smith of Greeley, Colorado; that said conference was called by the State Engi-

neer of the State of Wyoming for the purpose of protesting to the officials of the State of Colorado and other persons interested in water appropriations in Colorado the diversion of water from the Laramie River in the State of Colorado in excess of 39,750 acre feet which had theretofore been allocated to the State of Colorado from the Laramie River by the Supreme Court of the United States.

That on said date and at said place, as aforesaid, the State Engineer of the State of Wyoming and affiant made repeated demands upon the State officials of the State of Colorado that they close the headgates on the Laramie River in the State of Colorado and that said officials of the State of Colorado, together with other representatives interested in water appropriations in Colorado, refused to close said headgates.

Affiant further states that he did not, at any time, either before or after the 18th day of June, A. D. 1939, consent to the Meadowland appropriators continuing to divert water from the Laramie River in Colorado after the total amount of 39,750 acre feet had been diverted within the State of Colorado from the Laramie River; affiant further states that after said conference, as aforesaid, was held, he did, on the 7th day of July, A. D. 1939, again make written demand upon the State of Colorado to close said headgates, a copy of said written demand is marked Exhibit "B" in complainant's petition for rule to show cause on page 15 thereof.

Affiant further states that he has examined the hydrographic records in the office of the State Engineer of the State of Wyoming and that said records show that from the 18th day of June to and including the 30th day of August, 1939, the State of Colorado permitted the diversion of 16,599 acre feet of water over and above the total

allocation of 39,750 acre feet allocated to the State of Colorado from the Laramie River in the State of Colorado by the Supreme Court of the United States.

Further affiant sayeth not.

EWING T. KERR

Subscribed in my presence and sworn to before me this 28th day of March, A. D. 1940.

RUBY B. SALYER
Notary Public.

(SEAL)

My commission expires March 25, 1943.

WHEREFORE, complainant prays that leave of Court be granted to submit these affidavits on behalf of the State of Wyoming, the complainant herein.

EWING T. KERR,
Attorney General of the State of Wyoming

HAROLD I. BACHELLER,
Deputy Attorney General

ARTHUR KLINE,
Assistant Attorney General.

Solicitors for Complainant, the State of Wyoming.

FILED
APR 1 1940
CHARLES ELMORE CROPLEY
CLERK

In the

Supreme Court of the United States

October Term, 1935.

In Equity.

No. 10, ORIGINAL.

THE STATE OF WYOMING, *Complainant*,

vs.

THE STATE OF COLORADO, *Defendant*.

BRIEF OF DEFENDANT.

RALPH L. CARR,
Governor of the State of Colorado,
CLIFFORD H. STONE,
JEAN S. BREITENSTEIN,
Special Counsel for the State of Colorado.

Denver, Colorado,
March 30, 1940.

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In the

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In Equity.

No. 10, ORIGINAL.

THE STATE OF WYOMING, *Complainant,*

vs.

THE STATE OF COLORADO, *Defendant.*

BRIEF OF DEFENDANT.

FORMER DECISIONS.

The former opinions and decrees of this Court in this controversy are officially reported as follows:

Wyoming v. Colorado, 259 U. S. 419;
Wyoming v. Colorado, 259 U. S. 496;
Wyoming v. Colorado, 260 U. S. 1;
Wyoming v. Colorado, 286 U. S. 494;
Wyoming v. Colorado, 298 U. S. 573.

JURISDICTION.

This cause involves a controversy between two states of the union. The original jurisdiction of the Court is invoked.

STATEMENT OF THE CASE.

1. In General.

This proceeding has been brought by Wyoming to require Colorado to be

(a) adjudged in contempt of this Court,

(b) punished for the alleged violation of an injunctive decree, and

(c) compelled to make restitution to Wyoming and her water users for alleged injuries.

In 1911 an original suit was brought by Wyoming against Colorado and two Colorado corporations to prevent a proposed diversion in Colorado of part of the waters of the Laramie river, an interstate stream which is unnavigable (259 U. S. 455, 456). A decree, entered therein on October 9, 1922, states that (260 U. S. 1):

> "It is considered, ordered, and decreed that the defendants, their officers, agents, and servants, be, and they are hereby, severally enjoined from diverting or taking from the Laramie river and its tributaries in the state of Colorado more than 15,500 acre feet of water per annum in virtue of or through what is designated in the pleadings and evidence as the Laramie-Poudre Tunnel appropriation in that state.
>
> Provided that this decree shall not prejudice the right of the state of Colorado, or of any one recognized by her as duly entitled thereto, to continue to exercise the right now existing and hereby recognized to divert and take from such stream and its tributaries in that state 18,000 acre feet of water

per annum in virtue of and through what is designated in the pleadings and evidence as the Skyline Ditch appropriation in that state, nor prejudice the right of that state, or of any one recognized by her as duly entitled thereto, to continue to exercise the right now existing and hereby recognized to divert and take from such stream and its tributaries in that state 4,250 acre feet of water per annum in virtue of and through the meadowland appropriations in that state which are named in the pleadings and evidence, nor prejudice the right of the state of Colorado, or of any one recognized by her as entitled thereto, to continue to exercise the right now existing and hereby recognized to divert and take from the headwaters of Deadman creek, a Colorado tributary of the Laramie river, the relatively small amount of water appropriated therefrom prior to the year 1902 by and through what is designated in the evidence as the Wilson Supply Ditch, nor prejudice or affect the right of the state of Colorado or the state of Wyoming, or of any one recognized by either state as duly entitled thereto, to continue to exercise the right to divert and use water from Sand creek, sometimes spoken of as a tributary of the Laramie river, in virtue of any existing and lawful appropriation of the waters of such creek."

In 1930 Wyoming brought an original suit against Colorado to enforce the above decree (286 U. S. 494, 495). A motion to dismiss filed by Colorado was overruled on May 31, 1932. In its opinion then rendered this Court, in referring to the above decree, said (286 U. S. 508):

"* * * we think it (the decree) was intended to and does define and limit the quantity of water which Colorado and her appropriators may divert from the interstate stream and its tributaries and thus withhold from Wyoming and her appropriators."

Colorado then filed her answer. Evidence was taken before commissioners. The decision announced on June 1, 1936, held that the 1922 decree should be taken as if the exact amount of 2,000 acre feet were written into the provision relative to the Wilson Supply Ditch appropriation. In determining that Skyline Ditch diversions in excess of 18,000 acre feet per annum did not constitute an infraction of the 1922 decree, the Court said (298 U. S. 585):

> "The thing which the decree recognizes and confirms is 'the right of the state of Colorado, *or of any one recognized by her as duly entitled thereto,* * * * to divert and take' the water included in the designated appropriations."

It was further held that in reference to the meadowland appropriations the 1922 decree referred to "the water taken from the stream at the point of diversion" and the following decree was entered:

> "IT IS CONSIDERED, ORDERED AND DECREED that the state of Colorado, her officers, agents and servants, and her water claimants, be, and they are hereby, severally enjoined from diverting or taking from the Laramie river and its tributaries in the state of Colorado more than four thousand, two hundred and fifty (4,250) acre feet of water per annum in virtue of and through the meadowland appropriations in that state which are named in the pleadings and evidence, such diversion to be measured at the headgates through which the water is diverted."

2. The Petition of Wyoming.

After alleging the jurisdictional facts, the petition sets up the 1922 decree and asserts that thereby this Court confirmed and established the right of Colorado or of any one recognized by her as duly entitled thereto to divert and take the amounts above mentioned and the right

of Wyoming and her water claimants to receive and divert the remaining water of the stream and its tributaries. Paragraph Fifth avers that from May 1 to June 18, 1939, the following quantities of water were taken from the stream in Colorado:

Skyline ditch	9,013 acre feet;
Laramie-Poudre tunnel	7,458 acre feet;
Wilson Supply Ditch	872 acre feet;
Meadowlands	22,526 acre feet;
Total	39,869 acre feet.

It is then alleged that on June 19, 1939, Colorado closed all headgates and posted a notice on each. Paragraph Seventh states that on June 22, 1939, in violation of the decree of this Court rendered June 1, 1936, the Colorado headgates were reopened and water in excess of "the total allocation of 39,750 acre feet" was taken in the following quantities up to July 11, 1939:

Skyline ditch	3,644 acre feet;
Laramie-Poudre tunnel	2,530 acre feet;
Meadowlands	6,499 acre feet;
Total	12,673 acre feet.

It should be noted that no diversions after June 19, 1939, are charged to the Wilson Supply Ditch.

The petition then refers to the decree of June 1, 1936, and in Paragraph Ninth specifically charges a violation thereof in the following language:

> "That the said defendant, the state of Colorado, her officers, agents and servants, and her water claimants, has intentionally disobeyed said injunctional order and decree and, in contempt of this Honorable Court the said defendant, her officers, agents and servants, and her water claimants, from

on or about the first day of May, A. D. 1939, to and including the eleventh day of July, A. D. 1939, has diverted, taken and permitted the diversion and taking through the headgates of said meadowland ditches, from the natural channel of the said Laramie river in the state of Colorado, 24,775 acre feet of water over and above the 4,250 acre feet of water awarded and set over unto said meadowland diversions under the decree of this Honorable Court of June 1, A. D. 1936."

Material and substantial injury is alleged in general terms. It is noteworthy that no loss of, or damage to, crops because of any withholding of water by Colorado is claimed.

Wyoming states that notice was given Colorado of diversions in excess of 39,750 acre feet and that Colorado was requested to close all headgates on the river forthwith. It is averred that on July 1, 1939, officials of the two states met at Denver, Colorado, at which meeting Wyoming protested the excess diversions and Colorado, while admitting diversions in excess of 39,750 acre feet, refused to close the ditch headgates. On July 7, 1939, Wyoming formally protested in writing and requested Colorado to prevent the alleged excessive diversions. In the concluding paragraph it is stated that the diversions complained of are all in Colorado and are outside of the jurisdiction of Wyoming. Substantial damage is again alleged without any particular statement as to the nature or pecuniary amount of such damage.

The prayer is that Colorado be required to show cause

"* * * why the said defendant should not be adjudged in contempt and punished for violating said injunction and decree; that a fine be imposed upon said defendant, for the use of said complainant, sufficient in amount to reimburse your complainant and her water appropriators from the said

Laramie river for injuries sustained by reason of the violation by the said defendant of said injunctional order and decree of June 1, A. D. 1936."

On March 4, 1940, this Court ordered that Colorado show cause on or before March 25, 1940, why the prayer of the petition should not be granted.

3. The Return of Colorado.

Colorado sets out the facts with relation to the administration of the stream in Colorado since the decree of June 1, 1936, and says that the time for the filing by Colorado of a petition for rehearing was extended to September 15, 1938, with Wyoming's consent and during said period the Colorado meadowland appropriators, with the knowledge and consent of Wyoming, diverted water in accordance with the Colorado laws as had been their custom for over 50 years. In 1937 the two states cooperated in the installation on seven representative meadowland ditches of headgates equipped with automatic measuring gages so that a joint study could be made of the irrigation of the Colorado meadowlands. This study revealed that in 1937 approximately ten acre feet of water was diverted at the headgates for the irrigation of each acre of meadowland. Prior to the 1939 irrigation season measuring devices were installed on all Colorado meadowland ditches.

On September 24, 1938, a Colorado meadowland appropriator brought a class suit against the Colorado transmountain appropriators and Colorado water officials. This resulted in a decree as of February 2, 1939, wherein the Colorado district court ruled in favor of the meadowland appropriators and enjoined that the stream be administered in accordance with Colorado law until a total of 39,750 acre feet of water had been diverted at the ditch headgates and that then all headgates should be closed. This case is now pending in the Colorado Supreme Court on writ of error.

During the 1939 irrigation season Colorado water officials administered the stream in accordance with Colorado law until the 39,750 acre feet had been diverted. All headgates were then closed. After such closing and in order to save their hay crop, the meadowland appropriators presented their situation to Wyoming and Ben E. Le Vasseur, the Wyoming hydrographer in charge of measuring and reporting water diversions on the Laramie river, in writing advised R. M. Leake, Jr., the secretary of the Upper Big Laramie River Water Users Association, that he had presented the matter of the reopening of the Colorado meadowland headgates to L. C. Bishop, the Wyoming state engineer, and that Wyoming would not object to the reopening of the meadowland headgates (Exhibit "C.") In accordance with such understanding and with the knowledge and consent of Wyoming the meadowland ditches again reopened their headgates. Later the transmountain diverters, with the exception of the Wilson Supply Ditch, reopened their headgates.

The conference with the Wyoming officials on July 1, 1939, is admitted and it is alleged that at such conference Wyoming did not object to the reopening of the meadowland headgates.

Colorado further avers that water diverted in 1939 contrary to the decree of June 1, 1936, was diverted with the knowledge, consent and acquiescence of Wyoming and that Colorado did not authorize or direct any diversion after 39,750 acre feet had been diverted at the ditch headgates. Identical methods for the irrigation of meadowlands along the Laramie river have been used in both Wyoming and Colorado since the settlement of that valley. With knowledge that such methods result in a return directly to the stream of 75% of the headgate diversions, Wyoming pleaded in the original suit in this Court the fact of such return and in 1939 consented to the reopening of the Colorado meadowland headgates.

It is then alleged in the return that Colorado recognizes that under the decisions and decrees of this Court she is now limited to headgate diversions of 39,750 acre feet annually. In the distribution of this water the local Colorado laws apply. Wyoming has disregarded the fact that the meadowland diversions in excess of 4,250 acre feet were in accord with the state law until June 18, 1939, and thereafter were with the consent of Wyoming.

Colorado alleges that Wyoming and her water users suffered no injury from the acts complained of in the petition and that to the contrary Wyoming's own statements and admissions established that Colorado withheld 8,977 acre feet less than her equitable share of 39,750 acre feet.

The return states that the administration of the stream in 1939 was difficult because of disputes between the meadowland and transmountain appropriators as to the effect of the decisions and decrees of this Court and that notwithstanding such difficulty the Colorado officials complied with the decrees of both this Court and the Colorado Court until the headgate diversions amounted to 39,750 acre feet. Thereafter the confusion resulting from Wyoming's consent to the reopening of the meadowland headgates caused further uncertainty. The Colorado officials did not authorize or direct any diversions after 39,750 acre feet had been taken.

Colorado says that in the future, unless this Court orders otherwise, the flow of the stream will be administered under Colorado law until 39,750 acre feet is taken at the headgates which will then be closed and kept closed during the remainder of the irrigation season.

Particular attention is directed to the affidavits of the governor and state engineer of Colorado wherein they state that at the conference of July 1, 1939, the Wyoming officials did not object to the reopening of the meadowland headgates, saying that there was a return flow from such

headgate diversions in excess of 75%. Also the affidavit of R. M. Leake, Jr., as to the circumstances under which the Colorado meadowland headgates were reopened should be noted.

SPECIFICATION OF POINTS TO BE URGED.

Wyoming relies upon the proposition that diversions by the Colorado meadowland appropriators in excess of 4,250 acre feet in 1939 constitute a violation of the 1936 decree.

Colorado contends in defense:

1. Meadowland diversions in excess of 4,250 acre feet were in accordance with Colorado law and the decrees of this Court until June 18, 1939 (when a total of 39,750 acre feet had been diverted at Colorado ditch headgates), and thereafter were with the consent and acquiescence of Wyoming.

2. Wyoming has not been injured.

SUMMARY OF ARGUMENT.

The argument for Colorado may be summarized as follows:

I. The return of the governor of the state of Colorado is the return of the state of Colorado.

II. This is a suit between states which should be considered with proper regard for the nature of the controversy and not with regard solely for the technical niceties of procedure.

III. In an interstate suit involving the apportionment of the water of an interstate stream between states, this Court does not determine individual rights between water users in one of the states.

IV. The decisions in this controversy make an equitable apportionment of stream flow and do not change the relative rights of Colorado appropriators.

V. The alleged excessive meadowland diversions in 1939 were with the consent and acquiescence of Wyoming.

VI. Wyoming has suffered no injury.

VII. Wyoming has made no showing to justify the exercise of the extraordinary power to punish for contempt.

VIII. Conclusion.

ARGUMENT.

I.

THE RETURN OF THE GOVERNOR OF COLORADO IS THE RETURN OF THE STATE OF COLORADO.

The governor of the state of Colorado, by his executive order of March 20, 1940, removed Byron G. Rogers, attorney general of the state of Colorado, as the duly accredited representative of the state of Colorado in this cause. By Section 2, Article IV, of the Colorado Constitution, the supreme executive power of the state is vested in the governor (Return, page 2). There is no statute of the state of Colorado authorizing the Colorado attorney general to appear for Colorado in an interstate suit in this Court except when required so to do by the governor or General Assembly of the state. There has been no such requirement in the instant case.

It has been settled that where a state of the union is a party litigant in this Court the governor represents the state (Ex Parte Kentucky v. Dennison, 24 How. 66, 98, 16 L. Ed. 717, 726). Accordingly, the return made herein by the governor of the state of Colorado should be considered as the return of the state.

II.

THIS IS A SUIT BETWEEN STATES WHICH SHOULD BE CONSIDERED WITH PROPER REGARD FOR THE NATURE OF THE CONTROVERSY AND NOT WITH REGARD SOLELY FOR THE TECHNICAL NICETIES OF PROCEDURE.

This Court will not exert its extraordinary power to control the conduct of one state at the suit of another unless the threatened invasion of rights is of serious magnitude and established by convincing evidence (Connecticut v. Massachusetts, 282 U. S. 660, 669, 51 S. Ct. 286, 289; Washington v. Oregon, 297 U. S. 517, 522, 56 S. Ct. 540, 542). The burden on Wyoming herein to sustain her allegations is much greater than that generally required to be borne by one seeking to enforce by contempt proceedings an injunction granted in a suit between private parties (North Dakota v. Minnesota, 263 U. S. 365, 374, 44 S. Ct. 138, 139). Cases between states of the union are too important in character and the interests concerned too great to be decided upon mere technical principles of equity pleading (Rhode Island v. Massachusetts, 14 Pet. 210, 257). This case should be considered in the untechnical spirit proper for dealing with a quasi-international controversy (Virginia v. West Virginia, 220 U. S. 1, 27, 31 S. Ct. 330, 333). Municipal law relating to like questions between individuals is to be taken into account but is not to be deemed to have controlling weight (Connecticut v. Massachusetts, supra, page 670). Principles of right and equity having regard to the equal level and plane upon which all states stand in point of power and right under our constitutional system will be applied in determining this controversy (Wyoming v. Colorado, 259 U. S. 419, 465, 42 S. Ct. 552, 557).

III.

IN AN INTERSTATE SUIT INVOLVING THE APPORTIONMENT OF THE WATER OF AN INTERSTATE STREAM BETWEEN STATES THIS COURT DOES NOT DETERMINE INDIVIDUAL RIGHTS BETWEEN WATER USERS IN ONE OF THE STATES.

Wyoming's petition appears to be predicated upon the theory that this Court by its decree of June 1, 1936, absolutely limited the Colorado meadowland appropriators to headgate diversions of 4,250 acre feet per annum. This is erroneous because this Court actually determined the equitable apportionment of stream flow belonging to Colorado and nothing else.

This Court unquestionably has jurisdiction in an original suit between two states to equitably apportion the flow of an interstate stream. It has been held in such suits that private water users are not proper parties. In Kansas v. Colorado, 206 U. S. 46, 85, 27 S. Ct. 655, again in this litigation Wyoming v. Colorado, 259 U. S. 419, 467, 42 S. Ct. 594, and in Nebraska v. Wyoming, 295 U. S. 40, 43, 55 S. Ct. 568, 569, this Court has held that such a suit is not between private appropriators but is one between states whose interests are indissolubly linked with the rights of their water users.

Under the appropriation doctrine prevailing in both Wyoming and Colorado the rights of individuals in the use of water are acquired under state laws. This principle has been recognized by this Court in the case of Arizona v. California, 283 U. S. 423, 459, 51 S. Ct. 522, 527, wherein it is said:

> "To appropriate water means to take and divert a specified quantity thereof and put it to beneficial use *in accordance with the laws of the state where such water is found*, and, by so doing, to acquire

> *under such laws,* a vested right to take and divert from the same source, and to use and consume the same quantity of water annually forever, subject only to the right of prior appropriations." (Italics ours.)

In Kansas v. Colorado, 206 U. S. 46, 93, 27 S. Ct. 655, 665, this Court held that a state has full jurisdiction over the lands within her borders, including the beds of streams and other waters. By the Desert Land Act of 1877 Congress declared that

> " * * * all surplus water over and above such actual appropriation and use, together with the water of all lakes, rivers and other sources of water supply upon the public lands therein navigable, shall remain and be held free for the appropriation and use of the public for irrigation, mining and manufacturing purposes subject to existing rights." (Act of March 3, 1877, c. 107, Sec. 1, 19 Stat. 377, 43 U. S. C. A. 321.)

In California-Oregon Power Company v. Beaver Portland Cement Company (295 U. S. 142, 164, 55 S. Ct. 725, 731) it was held that:

> "* * * following the Act of 1877, if not before, all non-navigable water of any part of the public domain became publici juris subject to the plenary control of the designated states * * *."

It is thus apparent that both this Court and Congress have recognized the control of the states over the appropriation of water within their borders. This power of a state to determine rights as between its own water users may not be abridged or impaired in any way. The proposition involved is fundamental. Private water users who may not be parties to suits in this Court between two states may not have their vested rights impaired or destroyed thereby. The equitable apportionment of stream

flow whether by decree of this Court or by compact is not such an impairment or destruction (Hinderlider v. La Plata, 304 U. S. 92, 58 S. Ct. 803). On the other hand the modification of state decrees by changing the relative rights of individual water users is an impairment and destruction of vested rights.

An adjudication in interstate river litigation binds the individual water users to the extent of the particular state's equitable interest in the river; but the relative rights between the private appropriators within the state are controlled by the local laws, under which rights are vested in individual appropriators in the state's equitable apportionment of an interstate river. These vested rights cannot be abridged or impaired in violation of the Fifth Amendment to the Constitution of the United States.

It is, of course, elementary that strangers to a judgment or decree are not bound thereby in actions in personam (National Licorice Company v. National Labor Relations Board, 60 S. Ct. 566, decided March 4, 1940). An exception is recognized in the cases of a judgment strictly in rem but it has been held by the 10th Circuit Court of Appeals (Albion v. Naf Irrigation Company, 97 F. 2d 439, 444), that such exception does not apply to judgments in proceedings quasi in rem like suits to quiet title or to adjudicate water rights. A suit between two states over the apportionment of the flow of an interstate stream is not a case strictly in rem.

The situation before the Tenth Circuit Court in Albion v. Naf Irrigation Company, supra, is somewhat analogous. The Court there considered a dispute between water users in the state of Utah and water users in the state of Idaho. In affirming the decree of the trial Court the Court said (97 F. 2d 445):

> "The sole province of the trial court was to divide the waters between the users in the state of

> Utah and the users in the state of Idaho, and leave the division of the waters among the several users in the upper group to the state court decree to which they were parties and among the several users in the lower group to the federal court decree to which they were parties. While in so doing it was the duty of the trial court to recognize the several priorities we cannot say from the evidence before us and the findings that the decree did not fully recognize the priorities of the several users on the stream."

Likewise, in this suit between Wyoming and Colorado the division of water among the several users in each state depends entirely upon the laws of their respective state.

IV.

THE DECISIONS IN THIS CONTROVERSY MAKE AN EQUITABLE APPORTIONMENT OF STREAM FLOW AND DO NOT CHANGE THE RELATIVE RIGHTS OF COLORADO APPROPRIATORS.

The decisions of this Court in this controversy show clearly that the Court has made an equitable apportionment between Wyoming and Colorado of the stream flow by defining the quantity of water which Colorado may withhold from Wyoming. Wyoming commenced this litigation by suing Colorado to prevent a proposed transmountain diversion through the Laramie-Poudre Tunnel. The Court considered the principle of "equity of right" referred to in Kansas v. Colorado, supra, and held that, between two states each of which adhered to the appropriation as opposed to the riparian doctrine, the rule of priority furnished the only basis consonant with right and equity for the division of the stream flow (259 U. S. 470). After analyzing the evidence the Court concluded that the stream flow at the interstate station "after the recognized Colorado appropriations are satisfied" was 170,000 acre

feet per annum (259 U. S. 485) and that the entire available supply for the proposed Colorado transmountain appropriation and the Wyoming appropriations was 288,000 acre feet per annum (259 U. S. 488). The Wyoming rights senior to the proposed Colorado tunnel project were fixed at 272,500 acre feet and a decree was ordered enjoining a diversion of more than 15,500 acre feet per year by means of the Laramie-Poudre Tunnel.

The decree which was entered enjoins Colorado "from diverting or taking" more than 15,500 acre feet of water per annum "in virtue of or through" the Laramie-Poudre Tunnel appropriation. After this specific injunction it is stated "provided that this decree shall not prejudice the right of the state of Colorado or of any one recognized by her as duly entitled thereto *to continue to exercise the right now existing and hereby recognized* to divert and take" 18,000 acre feet of water per annum in virtue of and through Skyline Ditch appropriation, 4,250 acre feet of water per annum in virtue of and through the meadowland appropriations, 2,000 acre feet of water by and through the Wilson Supply Ditch. *This is a recognition, not an adjudication, of the Colorado rights existing prior to the Laramie-Poudre Tunnel appropriation.*

In the second suit brought by Wyoming against Colorado to enforce the above decree Colorado filed a motion to dismiss contending that the decree did not determine the full quantity of water which rightfully might be diverted from the stream in that state. This was overruled, the Court saying (286 U. S. 533, 508, 52 S. Ct. 621, 626):

> "construing the decree in the light of the record and opinion to which counsel for both states appeal, we think it was intended to and does define and limit the quantity of water which Colorado and her appropriators may divert from the interstate stream and its tributaries and thus withhold from Wyoming and her appropriators."

Colorado then filed her answer and evidence was taken before commissioners.

In determining upon its merits this second action the Court stated in its opinion (298 U. S. 578) that there were two departures from the decree charged against Colorado, "one comprising diversions under claims not confirmed or recognized in the decree, and the other consisting of diversions under each of the confirmed Colorado claims of more water than the decree accredits to the claim." After disposing of the first proposition in favor of Colorado, the Court considered the meadowland appropriations and ruled that the figure stated in the 1922 decree referred to headgate diversions rather than to consumptive use. An injunction was then ordered "forbidding further departures from the decree in this regard." The Court then discussed the alleged departures from the decree by the Colorado transmountain diverters and recited that Wyoming's complaint charged that the diversions under the Skyline Ditch and the Laramie-Poudre Tunnel have been in excess of the quantities accredited to them by the decree and that Colorado's answer admitted the charge in respect to the Skyline appropriation, denied that the Laramie-Poudre Tunnel diversions have been in excess of the accredited quantities, and alleged that Colorado lawfully may permit diversions under any of the recognized appropriations in excess of the accredited quantities so long as the total diversions under all do not exceed the aggregate of the quantities accredited to them severally. The Court then found from the evidence that the Skyline appropriation had exceeded the quantity stated in the decree, that the tunnel appropriation had not, and that, if the meadowland appropriations were put aside, the total diversions under the other appropriations had not exceeded in the aggregate the quantities accredited to them separately. The position taken by Colorado in the defense of the Skyline diversions was sustained by the Court in the following language:

"It was not the purpose of that suit or of the decree to withdraw water claims dealt with therein from the operation of local laws relating to their transfer or to restrict their utilization in ways not affecting the rights of one state and her claimants as against the other state and her claimants.

We perceive no reason for thinking that it is in any wise material to Wyoming and her water claimants whether the water in question is diverted and conveyed to the place of use through the Skyline Ditch, the Wilson Supply Ditch, or the ditches of the Laramie-Poudre Tunnel project. All are transmountain ditches and deliver the water in the Cache La Poudre Valley, which is in another watershed.

The diversions through the transmountain ditches in the quantities here shown are made with the consent of the owners of the water rights and with the full sanction of Colorado. Therefore, as respects the present question, the situation is not different from what it would be had the owners of the other claims formally transferred parts of their water rights to the Skyline owners. The appropriations remain as they were when the decree was entered, and are still limited to the quantities which it accredits to them. But the Skyline owners are now permitted by the owners of the other claims and by Colorado to take and use part of the waters included in those claims. Wyoming and her claimants are in no way injured by this. No departure from the decree is involved. The thing which the decree recognizes and confirms is 'the right of the state of Colorado, or of any one recognized by her as duly entitled thereto, * * * to divert and take' the water included in the designated appropriations.

We are accordingly of opinion that in the circumstances here shown the Skyline Ditch diversions

do not constitute an infraction of the decree." (56 S. Ct. 917.)

In other words, this Court in dealing with the Colorado diverters who export water from the Laramie River Basin applied the principle that diversions may be made in excess of the figure stated in the 1922 decree so long as the total diversions do not exceed the aggregate of the quantities severally accredited. If this principle is good as between the Colorado transmountain appropriators it is equally good as between the Colorado transmountain appropriators as a class and the Colorado meadowland appropriators as a class. No distinction can be recognized between the two groups of ditches. Paraphrasing the statement made by this Court with respect to the Skyline Ditch, the Wilson Supply Ditch and the Laramie-Poudre Tunnel (298 U. S. 584) it can also be said "we perceive no reason for thinking that it is in any wise material to Wyoming and her water claimants, whether the water in question is diverted and conveyed to the place of use through the transmountain ditches or the meadowland ditches."

The district court of Larimer County, Colorado, has determined (see Exhibit "B" attached to Colorado's return) that meadowland appropriators have rights amounting to 203 second feet (400 acre feet per day) senior to the earliest transmountain appropriation (that of the Skyline Ditch). These senior vested rights are destroyed without their owners having had the opportunity to present a defense in Court if this Court fails to apply to Colorado's entire equitable apportionment of stream flow the principle which it has already applied to the division of water among the Colorado transmountain appropriators.

The Court did not intend by its decree of June 1, 1936, to modify the Colorado adjudication decrees and thereby destroy the vested property rights of the Colorado meadowland appropriators by limiting their annual diversions to 4,250 acre feet measured at the headgates. The entire

difficulty arises from the fact that the amount of water accredited to the Colorado meadowland appropriators by the decrees of 1922 and 1936 is less than they are entitled to receive under their Colorado priorities. This results from the 1936 determination that the 4,250 acre feet figure refers to headgate diversions rather than consumptive use. Such determination was only effective in so far as it concerned the measurement of the total quantity of the Colorado right.

By recognizing and confirming the Colorado rights senior to the Laramie-Poudre Tunnel, the Court did not adjudicate the relative priorities or seniorities of such rights under Colorado law.

V.

THE ALLEGED EXCESSIVE MEADOWLAND DIVERSIONS IN 1939 WERE WITH THE CONSENT AND ACQUIESCENCE OF WYOMING.

Wyoming alleges in her petition (paragraph Ninth) that Colorado has disobeyed the decree of June 1, 1936, by taking "through the headgates of said meadowland ditches from the natural channel of the said Laramie river in the state of Colorado, 24,775 acre feet of water over and above the 4,250 acre feet of water awarded and set over unto said meadowland diversions under the decree of this honorable Court of June 1, A. D. 1936." The petition sets out meadowland diversions to June 18, 1939, of 22,526 acre feet (on June 18 Colorado's share of 39,750 acre feet had been diverted) and after that date and until July 11, 1939, of 6,499 acre feet.

Colorado's position is that the meadowland diversions to June 18, 1939, were proper because they were made in accordance with the priorities established by Colorado law and that the diversions complained of after June 18 and until July 11 were made with the consent and acquiescence of Wyoming.

Attached to Colorado's return as Exhibit "C" is the affidavit of R. M. Leake, Jr., the secretary of the Upper Big Laramie River Water Users As ociation which is composed of the Colorado meadowland appropriators on the Laramie river. On May 22, 1939, he wrote to the Wyoming official in charge of the interstate distribution of the stream flow, inquiring as to whether or not Wyoming would demand the closing of the meadowland headgates after the diversion of 39,750 acre feet of water in Colorado. On June 5, 1939, Ben Le Vasseur, special hydrographer of Wyoming, replied:

> "Upon receipt of your letter of May 22, 1939, I wrote to the Wyoming State Engineer, Mr. L. C. Bishop, and told him of your question concerning whether or not Wyoming would demand a regulation of the Upper Laramie ditches belonging to the valley ranchers after the 39,750 acre feet allowed Colorado by the Court decree has been used.
>
> At this time my orders are not to demand such a regulation, and it doesn't seem probable that Wyoming will demand a regulation of rights on the Laramie river where it will receive the benefit of the return flow."

The Leake affidavit further discloses that on June 10, 1939, the water users association adopted a resolution declaring that in view of the above quoted letter the members of the association would open their headgates after they had been closed by the Colorado officials and would keep them open until notified by Wyoming to close them. It is stated that the Wyoming hydrographer, Le Vasseur, was present at the meeting and approved of the action taken. The affidavit further states that when the state engineer of Wyoming requested the closing of the meadowland headgates such headgates were closed.

The affidavit of Ralph L. Carr, the governor of the state of Colorado, states that at a meeting held in his of-

fice July 1, 1939, attended by the attorney general and the state engineer of Wyoming, those two Wyoming officials stated that "although more than 4,250 acre feet of water had already been diverted * * * they had no objection to continued diversions being made through the meadowland ditches for the reason that a great portion of all of the water so diverted returned to the Laramie river to be used downstream by water appropriators within the state of Wyoming" and that the Wyoming state engineer said that "in his opinion at least 75% to 85% of all diversions into said meadowland ditches in Colorado returned to the Laramie river and became available for use by Wyoming and her appropriators." This affidavit is corroborated by the affidavit of the Colorado state engineer, M. C. Hinderlider which is attached to the return as Exhibit "E."

The failure of this Court to recognize Colorado's contention that the greater part of meadowland headgate diversions return to the stream (298 U. S. 581) does not preclude Wyoming from recognizing the fact of such return flow. Prior to the institution of this proceeding Wyoming always admitted that the Colorado meadowland diversions resulted in an enormous return to the stream. The methods of irrigating the meadowlands along the Laramie river in both states have been identical since the settlement of that valley approximately 70 years ago. From her own experience Wyoming knows that it is necessary to irrigate the hay on such meadowland so that the plant roots are kept moist until about August 1st of each year. For many years this has been accomplished in each state by the flooding of the fields with water diverted from the river. Experience in Wyoming has further shown that at least 75% of the water so diverted returns directly to the stream. Wyoming pleaded this fact in her original complaint (Vol. 1, page 7, transcript of record). After the entry of the decree of June 1, 1936, she made no objection to the meadowland diversions in that year. In 1937 she par-

ticipated with Colorado in a joint study of the irrigation of the meadowlands, a study which disclosed that there were headgate diversions of approximately ten acre feet of water for the irrigation of one acre of land. In 1938 Wyoming did not object to the irrigation of the meadowlands in accordance with the practice which had existed for many years. In 1939 after Colorado had closed the meadowland headgates, Wyoming consented to their reopening.

Under such circumstances the "equity of right" which is applied by this Court in determining interstate controversies requires that Colorado should not now be held accountable for the continuance of a practice that has existed for years and which Wyoming has expressly approved.

Even in litigation between private individuals the general rule is that the party at whose instance an injunction issued cannot have the party enjoined punished in a contempt proceeding for breach of the injunction when the breach was committed with his consent or acquiescence (Rapalje on Contempt, page 62, Sec. 47; High on Injunctions, 4th Ed., Sec. 437; 17 C. J. S. 53; 32 C. J. 492).

The act of Wyoming in consenting to Colorado meadowland diversions after the headgates had been closed by Colorado officials and then complaining in this Court because of such diversions is not "the high equity that moves the conscience of the Court in giving judgment between states" (Washington v. Oregon, 297 U. S. 517, 523, 56 S. Ct. 540, 543).

VI.

WYOMING HAS SUFFERED NO INJURY.

It has been repeatedly held that this Court will not exert its extraordinary power to control the conduct of one state at the suit of another unless the threatened in-

vasion of rights is of serious magnitude (Washington v. Oregon, 297 U. S. 517, 522, 56 S. Ct. 540, 542). It must appear that substantial interests of Wyoming are being injured before this proceeding may be maintained (Connecticut v. Massachusetts, 282 U. S. 660, 674, 51 S. Ct. 286, 291).

It is apparent that Wyoming has sustained no injury or damage by reason of the acts complained of in her petition. The petition alleges material and substantial injury in general terms only. No loss of, or damage to, crops in 1939 is asserted because of any withholding of water by Colorado. No allegation is made as to the nature or pecuniary amount of any damage. Moreover, a consideration of the allegations of the petition together with the admission of Wyoming fails to disclose that Wyoming was deprived of her equitable share of the stream flow in 1939.

In paragraphs 5 and 7 of her petition, Wyoming sets out the diversions by the Colorado transmountain appropriators as follows:

Skyline Ditch (to June 18)	9,013 acre feet;
Laramie-Poudre Tunnel (to June 18)	7,458 acre feet;
Wilson Supply Ditch (to June 18)	872 acre feet;
Skyline Ditch (June 22 to July 11)	3,644 acre feet;
Laramie-Poudre Tunnel (June 22 to July 11)	2,530 acre feet;
Total	23,517 acre feet.

The difference between this amount and 39,750 acre feet, or 16,233 acre feet, admittedly was available to supply the Colorado meadowland appropriations.

The petition sets out the meadowland diversions as follows:

To June 18, 1939	22,526 acre feet;
June 22 to July 11	6,499 acre feet;
Total	29,025 acre feet.

Colorado has heretofore shown that Wyoming by her pleadings in this litigation, and by the admission of her officials, has conceded that 75% of the meadowland headgate diversions return to the stream and are available for diversion and use in Wyoming. Hence the alleged Colorado meadowland diversions resulted in a withholding from Wyoming of an amount of water equal to 25% of 29,025 acre feet, or 7,256 acre feet. This amount added to the 23,517 acre feet of water taken by the Colorado transmountain appropriators makes a total of 30,773 acre feet of water which was actually withheld by Colorado from Wyoming. This is 8,977 acre feet less than this Court has determined Colorado's equitable share of the stream flow to be.

Moreover, it is easily demonstrable that the administration of Colorado's equitable apportionment of the stream flow in accordance with local Colorado law in future years will substantially benefit Wyoming and will in fact deprive Colorado of a portion of her equitable share of stream flow. The Wyoming petition alleges in Paragraph Fifth that on June 18, 1939, when there had been headgate diversions in Colorado of 39,750 acre feet, 17,343 acre feet had been diverted by the Colorado transmountain appropriators who export the water to another river basin. Deducting this amount from 39,750 we find that 22,417 acre feet was thus available for the meadowland appropriations. Under the admissions of Wyoming heretofore quoted that 75% of the meadowland headgate diversions returned to the stream, only one-fourth of such meadowland diversions or 5,604 acre feet was actually withheld from Wyoming by June 18th. This figure added to the amount taken by the transmountain appropriators makes a total of 22,947 acre feet of water actually withheld from Wyoming or 16,803

acre feet less than the amount which this Court has determined to be Colorado's equitable share of stream flow. The Colorado district court has held that in the administration of the flow of the Laramie river in Colorado the Colorado decrees are to be followed until a total of 39,750 acre feet has been diverted at the headgates and all headgates are then to be closed. As alleged in Paragraph Ninth of her return Colorado will in the future so administer the stream unless otherwise ordered by this Court. Accordingly, taking the figures set out in Wyoming's petition as being representative, Colorado under such administration of the stream will lose annually 16,803 acre feet of water.

It is thus apparent that instead of suffering injury in 1939, Wyoming, under the allegations of her petition considered together with her admissions, received a benefit which will be even greater in the years to come unless Colorado obtains some relief from this Court.

This Court has well said in Missouri v. Illinois, 200 U. S. 496, 522, 26 S. Ct. 268, 270:

> "Even in cases between individuals some consideration is given to the practical course of events."

VII.

WYOMING HAS MADE NO SHOWING TO JUSTIFY THE EXERCISE OF THE EXTRAORDINARY POWER TO PUNISH FOR CONTEMPT.

The power to punish for contempt is to be used sparingly and with great caution and deliberation even in cases involving individuals. This Court has said that (Gompers v. Bucks Stove & Range Company, 221 U. S. 418, 451, 31 S. Ct. 492, 502): "* * * the very amplitude of the power (to punish for contempt) is a warning to use it with discretion, and a command never to exert it where it is not necessary or proper."

In this proceeding one state of the union seeks to have a sister state adjudged in contempt and punished therefor. A similar situation appears to have never before arisen in the history of our union. There is no precedent for such action. In Louisiana v. Texas, 176 U. S. 1, 18, 20 S. Ct. 251, 257, it was said "public policy forbids the imputation to authorized official action of any other than legitimate motives." In Ex Parte Kentucky v. Dennison, 24 How. 66, 109, 16 L. Ed. 717, 730, this Court in referring to the duty of a governor to honor an interstate rendition request said, "but if the governor of Ohio refuses to discharge this duty there is no power delegated to the general government either through the judicial department or any other department to seek coercive means to compel."

However, Colorado says that this Court may by appropriate action enforce its decrees and accordingly defends upon the ground that Wyoming has failed to make out a case and that the diversions complained of were made with Wyoming's consent.

From the time of the settlement of the Laramie River Valley up through the irrigation season of 1938 Colorado meadowland appropriators irrigated their lands in accordance with their rights under applicable Colorado laws. These rights existed prior to the entry by this Court of its decree of October 9, 1922, and were recognized by that decree in the amount of 4,250 acre feet, an amount far below their rights under their Colorado priorities if such figure be held to refer to headgate diversions rather than consumptive use. The water officials and water users of both Wyoming and Colorado, well knowing that no hay crops could be raised on 4,250 acres of Laramie river hay land by the application thereto of but 4,250 acre feet of water, assumed that the figure mentioned in the decree referred to consumptive use. The irrigation practices continued as before. By its opinion and decree of June 1, 1936, the Court held that this view was erroneous and that the figure there mentioned referred to headgate diversions.

Nevertheless, the long existing irrigation practices continued through 1936, 1937 and 1938.

In the fall of 1938 Colorado meadowland appropriators brought suit in the proper Colorado court against the Colorado transmountain diverters and the Colorado officials for a declaratory judgment and injunction. In that action the meadowland appropriators contended that the decrees of this Court equitably apportioned the flow of the Laramie river between the two states and that upon such equitable apportionment the Colorado laws applied to distribute the water among Colorado water users. The defendants contended that the decrees of this Court modified the Colorado decrees both in amounts and priorities and gave to the Colorado transmountain diverters the right to divert annually specific amounts of water without regard to the meadowland decrees which, under the Colorado law, were senior in point of time. The Colorado district court entered a decree in favor of the plaintiffs and required the Colorado water officials to proceed in conformity with the Colorado laws until 39,750 acre feet of water had been diverted and then to close all headgates. A reading of the decree will convince anyone that the Colorado Court was endeavoring to comply with the decisions and decrees of this Court and was in no way disregarding or questioning the binding force of such decrees.

Prior to the 1939 irrigation season the Colorado meadowland appropriators were required for the first time to install measuring devices. The Colorado state engineer employed additional assistants to administer the stream flow and, when 39,750 acre feet had been diverted, closed all headgates and posted notices thereon. The Colorado transmountain diverters objected to the closing of their headgates, contending that their rights were fixed by this Court. Meadowland appropriators, as we have pointed out with the consent and acquiescence of Wyoming, reopened their headgates. A situation thus developed which had never before occurred. The Colorado state engineer was

in a quandary as to how to proceed. Wyoming at the conference heretofore mentioned made no objection to the reopening of the meadowland headgates but confined her protest to the transmountain diversions. On July 13, the Colorado state engineer again closed all headgates.

These facts establish that Wyoming has failed to prove "by clear and convincing evidence" an injury "of serious magnitude." To the contrary they establish that Colorado has lost, and unless relief can be obtained from this Court, will continue to lose a very substantial portion of her equitable share of the flow of the Laramie river. In spite of this loss Colorado, with full realization of her duties as a member of the union, can and will abide by and uphold the decisions of this Court.

VIII.

CONCLUSION.

Litigation over the Laramie river has been pending between Wyoming and Colorado for twenty-nine years. This Court might well suggest, as it did in New York v. New Jersey, 256 U. S. 296, 313, 41 S. Ct. 492, 498, that the problem be solved "by cooperative study and by conference and mutual concession on the part of representatives of the states so vitally interested."

Colorado asks that the rule to show cause be discharged and that the petition of Wyoming be dismissed.

Respectfully submitted,

RALPH L. CARR,
Governor of the State of Colorado,

CLIFFORD H. STONE,
JEAN S. BREITENSTEIN,
Special Counsel for the State of Colorado.

Denver, Colorado,
March 30, 1940.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1935.

No. 10, Original

THE STATE OF WYOMING,
COMPLAINANT,

VS.

THE STATE OF COLORADO,
DEFENDANT.

MEMORANDUM RE POWERS OF THE ATTORNEY GENERAL.

BYRON G. ROGERS,
Attorney General of Colorado.
HENRY E. LUTZ,
Deputy Attorney General.
SHRADER P. HOWELL,
Assistant Attorney General.

THE BRADFORD-ROBINSON PTG. CO., DENVER

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MEMORANDUM RE POWERS OF THE ATTORNEY GENERAL.

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

FOREWORD.

Honorable Ralph L. Carr, Governor of Colorado, having assumed to remove the undersigned Attorney General of the State, from participation in the above designated cause, and having assumed further to take control of the current proceedings herein, there is herewith respectfully submitted for the consideration of this Honorable Court a brief memorandum as to the powers of the Attorney General as defined by statute and judicial construction from

which it will appear that the Governor of Colorado is destitute of right, power or authority, to assume to displace the Attorney General, employ counsel, control litigation, or to represent the State.

MEMORANDUM.

Many duties have been cast by various statutes upon the Attorney General, and it is provided (Section 1, Chapter 13, Vol. II, C. S. A.):

> "The Attorney General shall attend in person at the seat of government during the sessions of the General Assembly and the Supreme Court, and shall appear for the state, prosecute and defend all actions and proceedings, civil and criminal, in which the state shall be a party in interest, when required so to do by the governor or general assembly, and shall prosecute and defend for the state all causes in the Supreme Court in which the state is a party in interest."

And it has been repeatedly held that the *Attorney General is vested with all the common law powers attaching to that office*, save in the one or two instances where those powers have been modified by statute.

Reference is first had to the case of *Jobbers' Association vs. People*, 21 Colo. Appeals 325. The information in that case was attacked as having been instituted by the Attorney General without authority, although the information recited the Attorney General had been "first required by the Governor of Colorado to prosecute this action". It was held by the Court,—

> "It seems quite clear that under this state of the law and fact that the attorney general was thus clothed with sufficient authority to institute the proceeding. But if not, then there can be no doubt that he is so authorized under the common law as judicially determined in this country."

The Court then refers to *20 Bradwell, page 288*, respecting the common law powers of the Attorney General. Reference is likewise made to the case of *People v. Tool*, 35 Colo. 236, where it is said:

> "It is the function of the Attorney General, by information, to protect the rights of the public, * * * ", etc.

It is to be noted that this case does not accord the statute quoted supra (Section 1, Chapter 13), as conferring upon or enlarging any of the powers of the Attorney General. *The statute in question merely imposes upon him the duty to act when requested by the Governor, but is in no sense either an investure of powers or a limitation of them.*

It was held by the Colorado Supreme Court in the case of *People v. Casias*, 73 Colo. 420, at page 423:

> "At the common law the Attorney General was the chief legal representative of the Crown. Our Federal and State governments have adopted the English judicial, as a part of their governmental system. It is generally held by our courts that this office is clothed, in addition to the duties expressly defined by statute, with all the powers and privileges which belong to it under the common law of England."

This case went on to say the Colorado statute there under discussion had conferred upon the district attorneys the Attorney General's common law rights of entering a *nolle prosequi*.

It was also held by the Colorado Supreme Court in the case of *State Board of Pharmacy v. Hallett*, 88 Colo. 331, that the common law powers of the Attorney General attach to his office in Colorado, save where they have been otherwise conferred or restricted by statute. In that case the District Attorney was given the right to represent and advise the Board of Pharmacy and to that extent was a

restriction of the common law powers of the Attorney General. Prior to the passage of the Pharmacy Act, the Attorney General would have been the adviser, and it is said, page 336:

> "Whatever duties the Attorney General had at the common law he still may have, except in so far as they have been taken away by legislative enactment."

There is no statute in Colorado anywhere taking away from the Attorney General the right to represent the sovereignty,—the People of the State. There is no authority anywhere, or power anywhere, either in the Constitution or the statute of Colorado conferring upon the Governor the right to remove the Attorney General in any case so ever. Upon the contrary, there is a Colorado statute to the effect that the Governor himself may not employ counsel in any case save with the consent of the Attorney General.

Reference is had to *Section 5, Chapter 156, Vol. IV, Colorado Statutes Annotated*, which reads:

> "Whenever the Governor is satisfied that an action or proceeding has been commenced which may affect the rights or interests of the state, he may, by and with the consent of the attorney general, employ counsel to assist the proper officer to protect such rights or interests; * * * ."

Section 6 of the same chapter provides that expenses so incurred under the preceding section may be allowed by the Governor and upon his certification shall be paid from the General Contingent Fund,—the consent of the Attorney General to the employment being requisite.

The State of Pennsylvania has a similar enactment respecting employment by state departments of counsel other than the Attorney General, and it was held in the case of *Puccirilli Brothers vs. Lewis, Auditor, and Snyder, State Treasurer*, 282 Pa. 328, 127 Atl. 832, that where the statute

makes it unlawful to employ counsel for the state without the approval of the Attorney General, while the employment of private counsel by the office is proper for the purpose of presenting their views, they cannot file an appearance or control the litigation.

If the principle of the foregoing decision is to be applied, counsel employed by the Governor in the instant case are without right to appear, save possibly to present the Governor's personal views.

By *Section 13, Chapter 3, Colorado Statutes Annotated*, the Department of Law is established and it is recited at Division 1:—

> "Division of Legal Affairs, the head of which shall be the Attorney General".

The Governor in his "Executive Order" purporting to remove the Attorney General and appoint other counsel (page 13, Governor's Return) refers to the Colorado Water Conservation Board. That board was established by *Chapter 265, Session Laws of Colorado*, 1937, and it is provided by *Section 7* of that act:

> "The Attorney General shall act as the legal adviser for the board. * * * and with his consent the board may employ additional legal counsel."

Section 9, among other things, requires that:

> " * * *, all legal assistants to be employed with the consent of the Attorney General".

Section 11(k) provides:

> "The Board shall cooperate with the Attorney General in all matters relating to interstate suits concerning the waters of the rivers of the state; and shall arrange for the gathering and compilation of all information, factual, engineering or other data requisite or desirable for the use

of the Attorney General in the conduct of such suits."

The foregoing act, if such were needed, expressly confers upon the Attorney General the sole right to conduct "interstate suits concerning the waters of the rivers of the state". By that act the Governor is chairman of the board. He stands expressly charged with knowledge of all the provisions of the act. Yet instead of requiring the cooperation the legislation specifies, he seeks to nullify its express provisions by a so-called "Executive Order". Neither that board nor its counsel (only permitted to serve by the Attorney General's consent) has any right to represent the State nor is Clifford H. Stone, appointed by the Governor, attorney for said Water Board, but its director only; nor is his purported service in these proceedings with the consent of the Attorney General; nor has the Governor any statutory or other power to designate Mr. Stone or anyone else as the representative of the State; nor can the Governor point to any authority so ever to represent the State himself, either directly or indirectly.

It is significant that the Governor's so-called "Executive Order" points to no authority in pretended justification, other than on page 2 of his Return where he recites *Section 2, Article IV of the Colorado Constitution*, reading:

> "The supreme executive power of the state shall be vested in the governor, who shall take care that the laws be faithfully executed".

But no sanction can be even fantastically spelled out of that provision for the attempted removal of the Attorney General from a case. Nor are the execution of any laws involved herein—merely a dispute as to the contents of a pleading in a litigated proceeding. Nor is the provision above quoted self-executing; nor can the Governor remove any state official for any act so ever. Impeachment alone is the remedy in Colorado. If the Governor's pretended action in the instant case is held to be valid, then he may succeed to the functions of every elected officer in

the State, with or without cause, on a mere "Executive Order". His purported action in the present instance is a mere usurpation, destitute of authority. No preceding governor in Colorado's history has ever assumed like powers, and, of course, Colorado has no applicable adjudications. The matter is purely one of state law and this Honorable Court, it is respectfully submitted, will not invest the Governor of this State with the power he usurps. So to do would be to place him at his whim in the control of the entire state government. He would merely have to disagree as to how any other constitutional or elected officer is discharging his duties, and indeed not even such disagreement would be necessary.

At page 11 of his brief the Governor refers to the early case of *Ex Parte Kentucky v. Dennison*, 24 Howard 66, 16 L.Ed. 717-726. That case involved no question of state law. It was merely held that "the practice" when the state is a plaintiff "has been frequently adopted of suing in the name of the Governor in behalf of the State". It is also there said that a suit against the Governor in his official capacity and character would be recognized as a suit against the state. This Court was not there determining any matter of state law, or adjudicating the powers of state officers as to who had the right to represent the State in this Court, and this Court has historically recognized the Attorneys General of all the states as their proper legal representatives. The Dennison case merely involved the matter as to getting the state into the Supreme Court. In the instant case Colorado has long been in this Court. The Governor undertakes to act as its legal representative, a right exclusively belonging to the Attorney General.

The laws that exist in Colorado on this subject are well stated in *C.J.S., Vol. 7, page 1213:*

> "An attorney general is the chief law officer of a state government or of the federal government, as the case may be. His office as well as his designation or title is one which is derived from the common law of England where from an early date the attorney general has been the chief legal

> representative of the sovereign whose duty it is to represent the crown in civil and criminal matters in the courts."

Also it is said in the same work, page 1229, respecting the exclusiveness of the authority of the Attorney General, as follows:

> "As a general rule the authority of the attorney general under constitutional and statutory provisions to represent the state with regard to matters of public interest is exclusive although in the absence of a constitutional restriction the legislature may provide special counsel for the state or any of its boards or officers who may act independently and not under the control of the attorney general."

The Governor is destitute of authority for his action in the instant case. He is without right either to demand the withdrawal of the Attorney General's appearance, or to curtail the powers of the Attorney General, or to control the present proceedings. The Attorney General possesses the exclusive right of representation of the State in the absence of restrictive legislation, and there is no such legislation in Colorado.

BYRON G. ROGERS,
Attorney General of Colorado.

HENRY E. LUTZ,
Deputy Attorney General.

SHRADER P. HOWELL,
Assistant Attorney General.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1935.

No. 10, Original

THE STATE OF WYOMING,
COMPLAINANT,

VS.

THE STATE OF COLORADO,
DEFENDANT.

DEFENDANT'S PETITION FOR REHEARING.

BYRON G. ROGERS,
Attorney General of the State of Colorado.
HENRY E. LUTZ,
Deputy Attorney General.
SHRADER P. HOWELL,
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THE BRADFORD-ROBINSON PTG. CO., DENVER

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DEFENDANT'S PETITION FOR REHEARING.

TO THE HONORABLE, THE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

It is submitted that the holding of the Court in this case constitutes a modification of its decree, the consequences whereof, (unless the decree shall be further modified) will work irremediable injury to Colorado.

The suit as originaly instituted related only to a proposed diversion from the Laramie River of some 50,000 acre feet of water for what is known as the Laramie-Poudre Tunnel. This Court by its original injunction restricted the tunnel diversion to 15,500 acre feet annually, after having ascertained, in the manner it pointed out, that such

amount only was available after gratifying prior Wyoming water rights.

The doctrine of priority as between appropriators was adopted and applied by this Court because that principle was in effect in both states. This Court entered no injunction respecting the Skyline Ditch appropriation of 18,000 acre feet, the Meadowland appropriations of 4,250 acre feet, the Deadman Creek or Wilson Supply Ditches, but left those Colorado appropriations not affected.

This Court unmistakably and unquestionably dealt with those several appropriators as individuals in accordance with what was deemed to be their respective rights based on use under their respective appropriations.

This is confirmed by an expression of this Court found at *page 576, 298 U. S.*, where it is said:

> "We are of opinion that the record, opinion, and decree in the prior suit, here reviewed at length, show very plainly that the decree must be taken as determining the relative rights of the two states, including their respective citizens, to divert and use the waters of the Laramie and its tributaries. These rights were put in issue by the pleadings, displayed in the evidence, and considered, and resolved in the opinion. Not only so, but the question of priority in time and right as between the appropriations in Colorado and those in Wyoming was directly presented by the pleadings and evidence and distinctly dealt with and resolved in the opinion."

The only limitation as noted was upon the tunnel appropriation.

In 1936 this Court by its injunction specifically limited the Meadowlands to 4,250 acre feet annually, headgate diversion and rejected the doctrine of consumptive use. It is true that the various appropriations discussed, together with those limited by this Court, aggregated 39,750 acre feet annually. It is also true, however, that for a period of approximately seventeen years, or from 1922 to 1939

when the Colorado District Court undertook to construe the decree of this Court as making a mass allotment only to Colorado, that each of the several Colorado appropriators regarded himself as vested individually by the decree of this Court with his individual accredited amount. Wyoming until the present instance has adopted the same theory.

This Court now confirms the interpretation of the Colorado District Court with no provision for the consequences it entails.

It may perhaps be assumed that this Court until its decision of April 22, 1940 also viewed its prior decisions as relating to individual as distinguished from mass allotment to Colorado, otherwise Colorado would not have been cited to show cause with relation to the 4,250 acre feet Meadowland appropriation, but would instead have been cited for having exceeded the total of 39,750 acre feet.

This Court now says in effect that the injunction respecting the Meadowlands is inoperative. The entire 39,750 acre feet may now, we take it, be diverted through that appropriation to the exclusion of all the transmountain allotments. And that in truth is just about what will transpire. It appears from Wyoming's petition herein and the returns thereto that on June 18th, 1939 when the headgates were closed the full 39,750 acre feet had been exhausted, and this indeed before the growing season got fairly under way. No crops can be grown to maturity in such circumstances.

There is one solution only, unless Colorado's major rights are to be destroyed, and that is for this Court to now recognize the return flow from these Meadowland appropriations. Failing such recognition will be to perpetuate factual error to the irreparable damage of Colorado. Failure to so recognize the return flow will nullify the doctrine of "Equitable Apportionment" laid down by this Court. It will result in great inequality as between the two states and will award Wyoming an inordinate share of the waters of the Laramie River.

As has been heretofore pointed out to this Court,

Wyoming in her original bill—her effort to enjoin the tunnel appropriation to another water shed—alleged at page 7, Volume I, Transcript of Record, now on file with this Court, that approximately seventy-five per cent of the Meadowland appropriations return to the Laramie River before it reached Wyoming and hence became subject to Wyoming appropriations and use.

In our Return to the Rule it was pointed out that Wyoming through its responsible officials even now agrees that seventy-five per cent or more of all such water returns to the Laramie River; and it was pointed out that the District Court of Colorado found as a fact approximately ninety per cent of the Meadowland appropriations return to the Laramie River.

The Court has in its rejection of the return flow principle applied a mere generality of theory in opposition to the specific facts exhibited by the record.

The acreage in question presents a status wholly distinct from all other Colorado lands using water from the Laramie River.

It is disclosed by the testimony of the various witnesses (pp. 396, 452, 512, 522 and 528 of the record) that the lands are of high elevation and that for the most part the irrigated portions lie immediately adjacent to the Laramie River. The valley is narrow, ranging in width from 200 feet to perhaps three-fourths of a mile, and the slope is toward the stream. The soil is porous and sandy, and the run-off is rapid. The growing season is short and the crops are limited to a single cutting of native hay of natural growth. The method of irrigation is and always has been what is known as the "flooding" method. No other method has ever been used as respects these lands. It is the only method available and adaptable to the nature of the soil and the situation on the ground. It is the same method employed by Wyoming users similarly situated (R. 481-485). True, it does involve a temporary diversion of considerable quantities of water. It does not involve ultimate depletion

of the river, nor does it involve a consumptive or beneficial use of more than the allotted 4,250 acre feet per annum.

The last is an engineering question, and at least seven experts have so given it as their opinion, see for instance the testimony of M. C. Hinderlider, State Engineer of Colorado (R. 411-412), C. L. Patterson, Irrigation Engineer (530 R.); R. J. Tipton (513, 517 and 864 R.), Professor Keezer (524-525 R.); H. L. Potts (554 R.), and George M. Bull (768 R.).

And this Court in its first opinion in this cause (page 483, 259 U. S.) expressly recognized return flow as a factor but has refused to apply it to Colorado. See for instance the following:

> "Where the places of use are in the same watershed and relatively near the stream, as is true of the lands on the Laramie Plains served by the greater part of the Wyoming appropriations, a substantial amount of water percolates back into the stream from irrigated areas and becomes available for further use lower down the stream. This is called return water. The amount varies considerably and there is no definite data on the subject. As respects irrigation on the Laramie Plains above the Wheatland diversion, the evidence satisfies us that the return water will certainly more than counterbalance the loss through evaporation and otherwise when the period of storage is not more than from one year to the next."

It has heretofore been pointed out to this Honorable Court, how under the Colorado decree confirmed by this Court, a loss of approximately 20,000 acre feet will and must inevitably ensue to Colorado appropriators and to such extent enlarge the benefits of Wyoming. In other words, that Colorado instead of receiving 39,750 acre feet will in fact receive not to exceed one-half that amount, unless this Court shall recognize and give effect to the true facts obtaining as respects the return flow from the Meadowlands. Otherwise grievous error will be perpetuated.

We appeal to the Court to grant a rehearing herein as respects the matter presented. In view of the Court's present interpretation of its several decisions such becomes imperative. Prior to this Court's last pronouncement, occasion for relief was not imperative. What were deemed the priorities fixed by this Court are now set aside.

Now by this Court's latest decision the contrary appears as respects individuals.

And too, it was said by this Court, *page 579, 298 U. S.*, that:

> "One complaint is of diversions through what are described in the bill and answer as Bob creek ditch, Bob creek extension ditch, Columbine ditch, and Lost Lake reservoir system. These diversions are admitted in the answer. They are made, not under claims recognized or confirmed in the decree, but quite independently of it. Under the decree, as it is pointed out in our opinion overruling the motion to dismiss, the Colorado claims which the decree recognizes and confirms are the only ones in virtue of which diversions may be made as against Wyoming and her appropriators. Claims not so recognized and confirmed are excluded."

Now the Bob Creek and other appropriators mentioned supra are claiming rights which will infringe upon the total of 39,750 acre feet annually. Immediately after this Court's ruling with respect to these rights, the State Engineer of Colorado on the advice of the Attorney General terminated all Bob Creek appropriations and destroyed a portion of the diversion works, but under the Court's last holding in this case, all these rights are now restored and those whose rights were previously determined, as was supposed, will now have to share with others who have not had the travail of long litigation and whose claims were thought at rest.

Hence Defendant Colorado again respectfully renews its appeal for a rehearing of the return flow question.

Otherwise, Colorado's rights will stand half destroyed for all time.

Respectfully submitted,

BYRON G. ROGERS,
Attorney General of the
State of Colorado.

HENRY E. LUTZ,
Deputy Attorney General.

SHRADER P. HOWELL,
Assistant Attorney
General.

COUNSEL'S CERTIFICATE.

The undersigned, Attorney General and counsel in the above designated cause, hereby certifies that the above and foregoing Petition for Rehearing has not been filed for delay, and further that in his opinion said Petition is meritorious.

BYRON G. ROGERS.
Attorney General of the
State of Colorado.

SUPREME COURT OF THE UNITED STATES.

No. 10, Original.—October Term, 1935.

The State of Wyoming, Complainant,
vs.
The State of Colorado, Defendant.

[April 22, 1940.]

Mr. Chief Justice Hughes delivered the opinion of the Court.

The State of Wyoming sought leave to file its petition for a rule requiring the State of Colorado to show cause why it should not be adjudged in contempt for violation of the decree in this suit, restraining diversions of water from the Laramie river. 259 U. S. 419, 496; 260 U. S. 1; 286 U. S. 494; 298 U. S. 573.

In response, Colorado asked that evidence be taken to determine the amount of return flow to the Laramie river from the diversions at the headgates of meadowland ditches and that Colorado have credit therefor. This matter had been considered by the Court in framing its decree (298 U. S. pp. 581, 582) and the motion was denied. Leave was granted to Wyoming to file its petition and Colorado was directed to show cause accordingly.

Two returns have been filed on behalf of Colorado, one by the Governor of the State setting forth his executive order directing the withdrawal of the appearance of the Attorney General and appointing special counsel to represent the State, and another return by the Attorney General who challenges the authority of the Governor to supersede him. In the view we take of the material matters presented, we find no such differences between the two returns as to require us to determine the question of authority.

Wyoming charges that from May 1, 1939, to June 18, 1939, Colorado diverted from the Laramie river 39,865.43 acre feet, that is, somewhat in excess of the total of 39,750 acre feet allocated to Colorado by our decree; that thereupon, and on June 19, 1939, Colorado closed the headgates of the various ditches involved; that on June 22, 1939, in violation of the decree, Colorado opened the headgates and permitted the diversion between June 22, 1939, and July 11, 1939, of 12,673 acre feet in excess of the 39,750 acre feet allowed;

and that in particular, with respect to meadowland ditches, Colorado permitted the diversion between May 1, 1939, and July 11, 1939, of 24,775 acre feet above the 4250 acre feet (measured at the headgates) specifically allowed for the meadowland appropriations. 298 U. S. p. 586.

In defense, Colorado contends that the meadowland diversions in excess of 4250 acre feet were in accordance with Colorado law and were not inconsistent with the decree of this Court until a diversion by Colorado from the Laramie river for all purposes reached the allocated total of 39,750; that the diversion of an amount greater than that total during the period above specified was with the acquiescence of Wyoming; and that Wyoming has not been injured.

Colorado pledges that hereafter its officials will administer the flow of the Laramie river in that State in accordance with Colorado laws and adjudication decrees until a total amount of 39,750 acre feet, measured at the headgates, has been diverted, and, when that total has been reached in any year, Colorado can and will close the headgates and keep them closed during the remainder of the irrigation season.

In support of the contention that the diversion of more than 4250 acre feet for the meadowland appropriations should not be regarded as a violation of our decree, if the aggregate diversions in Colorado do not exceed the total allowed, Colorado presents a declaratory judgment of the District Court of that State for the County of Laramie, entered February 2, 1939, in the suit of *Adelrick Benziger* v. *The Water Supply & Storage Company, et al.* That suit was brought on behalf of the meadowland appropriators in Colorado, and the defendants were the other appropriators in that State whose respective appropriations had been the subject of consideration in the suit in this Court. Our rulings were examined by the state court which concluded that they were intended to, and did, determine only the relative rights of the two States to divert the waters of the Laramie river and its tributaries and that it was not our purpose to withdraw the appropriations and water claims in Colorado from the operation of its local laws or to restrict the utilization of the waters in any way "not affecting the rights of the State of Wyoming and her water claimants". Accordingly the state court held that the fixing in our decree of the meadowland appropriations was intended only to bear upon the relative rights of the

States and was not intended to be an adjudication of the relative rights of the decreed appropriations in Colorado; hence, that so long as the aggregate of the water diverted in Colorado does not exceed the total of 39,750 acre feet accredited to the Colorado appropriations, as stated, they are subject to the laws of Colorado. In that view the Court adjudged that the meadowland appropriators and the defendant appropriators were entitled to divert according to their respective priorities until they reached the amount of 39,750 acre feet, and that when that amount had been diverted "all headgates are to be closed for the balance of the season".

A review of our decisions confirms the construction thus placed upon them. Suit was brought in 1911 to prevent a proposed diversion in Colorado of the waters of the Laramie river, an interstate stream. Voluminous evidence was taken, the case was thrice argued, and a final decision was rendered in 1922. 259 U. S. 419. After an elaborate consideration of the physical features of the region and the principles applicable to a determination of the rights of the respective States, the Court concluded that as both States had adopted the doctrine of appropriation, it was equitable to apply that doctrine and to determine their respective rights according to the rule of priority. The Court examined the evidence with respect to the flow of the stream, its variations, and other relevant matters, and found that the available supply—288,000 acre feet—was not sufficient to satisfy the Wyoming appropriations and also the proposed Colorado appropriation. The Court found that there were some existing Colorado appropriations entitled to precedence over many of those in Wyoming. These included 18,000 acre feet for what was known as the Skyline Ditch and 4250 acre feet for meadowland appropriators. These were not to be deducted, as the 288,000 acre feet was the available supply after they were satisfied. The proposed Colorado appropriation which was in controversy in the suit was that known as the Laramie-Poudre Tunnel diversion, a part of an irrigation project known as the Laramie-Poudre project. The evidence showed that the Wyoming appropriations having priorities senior to the one in Colorado, and which were dependent on the available supply above specified, required 272,500 acre feet. Deducting that from the available 288,000 acre feet there remained 15,500 acre feet which were subject to the proposed appropriation in Colorado. Accordingly a decree was entered enjoining the defendants from diverting more than 15,500 acre feet annually from the Laramie river through the Laramie-Poudre pro-

ject. The decree provided that it should not prejudice the right of Colorado, or of anyone recognized by her as entitled thereto, to continue to divert 18,000 acre feet through the Skyline Ditch and 4250 acre feet through the meadowland appropriations. 259 U. S. pp. 496, 497. Soon after, this decree was modified so as not to prejudice a diversion by Colorado for the Wilson Supply Ditch (260 U. S. 1), a diversion which amounted to 2000 acre feet. 298 U. S. p. 580. In this way the total allowed to Colorado amounted to 39,750 acre feet.

In 1931, Wyoming brought another suit in this Court, alleging that Colorado was permitting excessive diversions and seeking the protection and quieting of Wyoming's rights under the former decree. Wyoming asked provision for accurately measuring and recording the quantities of water diverted and also an injunction restraining excessive diversions, if it were held that the former decree related only to the diversion by the Laramie-Poudre Tunnel appropriation. Motion to dismiss the bill was denied. We held that the former decree should be taken as determining the relative rights of the two States, including their respective citizens, to divert and use the waters of the Laramie and its tributaries; that the limited injunction did not warrant an inference that it marked "the limits of what was intended to be decided", but that the decree did define the quantity of water which Colorado and her appropriators might divert "from the interstate stream and its tributaries and thus withhold from Wyoming and her appropriators". 286 U. S. 494, 506-508.

Final hearing was had and the case was decided in 1936. 298 U. S. 573. Wyoming contended that while the decree fixed the amount of the diversions under the meadowland appropriations in Colorado at 4250 acre feet, the actual diversions had ranged from 36,000 to 62,000 acre feet. Colorado answered that the greater part of this water was returned to the stream through surface drainage and percolation and that the part actually consumed did not exceed the amount which the decree allowed. The Court said that the amount of 4250 acre feet had been fixed as the measure of the meadowland appropriations because it was deemed sufficient for that purpose "when the water is rightly and not wastefully applied". The Court referred to the wasteful process that had been used. It was said that when water is so applied a considerable portion ultimately finds its way back into the stream, but that it was also true "that a material percentage of the water is lost by

evaporation and other natural processes and there is no way of determining with even proximate certainty how much of the water returns to the stream". The Court then held that the decree referred to the water taken from the stream "at the point of diversion, and not to the variable and uncertain part of it that is consumptively used". As it was plainly shown that diversions were being made under the meadowland appropriations in quantities largely in excess of the amount fixed in the decree, an injunction issued forbidding further departures from the decree in that regard. *Id.*, pp. 581, 582.

With respect to the request for an order permitting Wyoming to install measuring devices for the purpose of determining the amount of water diverted in Colorado, the Court recognized that the problem of measuring and recording the diversions was a difficult one and the hope was expressed that the two States by cooperative efforts would find a satisfactory solution. Leave was granted to Wyoming to make a later application if the States were unable to agree. *Id.*, pp. 585, 586. It seems that measuring devices have been installed.

While an injunction was thus granted with respect to diversions for the meadowland appropriations in excess of 4250 acre feet, this was manifestly upon the assumption that Colorado was otherwise using the total amount of water allocated to that State. That it was not intended to restrict Colorado in determining the use of the water of the river, according to Colorado laws and adjudications, provided the diversions did not exceed the aggregate amount of 39,750 acre feet to which Colorado was entitled, is clear from the ruling upon another branch of the case. It appeared that the diversion for the Skyline Ditch had been above the amount allowed therefor, but that other diversions were less, so that, eliminating the excessive meadowland diversions, the aggregate allowance to the State would not be exceeded. Hence the Court found that it must consider Colorado's contention "that, consistently with the decree, she lawfully may permit diversions under any of the recognized appropriations in excess of its accredited quantity, so long as the total diversions under all do not exceed the aggregate of the quantities accredited to them severally". *Id.*, p. 583.

The Court noted that in both Colorado and Wyoming water rights were transferable and that the use of the water may be changed from the irrigation of one tract to the irrigation of another,

if the change does not injure other appropriators; that these rules were but incidental to the doctrine of appropriation, prevailing in both States, upon which the decree had been based. The Court observed that it was not its purpose "to withdraw water claims dealt with therein from the operation of local laws relating to their transfer or to restrict their utilization in ways not affecting the rights of one State and her claimants as against the other State and her claimants". It was found that the diversions through the transmountain ditches had been made with the consent of the owners of the water rights and with the full sanction of Colorado, and hence the situation was not different from what it would have been if the owners of other claims had formally transferred parts of their water rights to the Skyline owners. The Court said: "But the Skyline owners are now permitted by the owners of the other claims and by Colorado to take and use part of the waters included in those claims. Wyoming and her claimants are in no way injured by this. No departure from the decree is involved. The thing which the decree recognizes and confirms is 'the right of the State of Colorado, *or of anyone recognized by her as duly entitled thereto,* . . . to divert and take' the water included in the designated appropriations". The Court concluded that in the circumstances shown the Skyline Ditch diversions did not constitute an infraction of the decree. *Id.*, pp. 584, 585.

It is plain that the principle of this ruling, as applied to the transmountain appropriations which diverted the water of the Laramie river to another watershed, would certainly also apply to the meadowland appropriations within the same watershed, where part of the water diverted may find its way back to the stream. The limitation of the meadowland appropriations to 4250 acre feet was to keep the diversions in Colorado within the amount allowed to that State, not to prevent the distribution of the water thus allowed, according to Colorado laws, where there was no infraction of the rights of Wyoming and her water claimants.

We conclude that the decree is not violated in any substantial sense so long as Colorado does not divert from the Laramie river and its tributaries more than 39,750 acre feet per annum.

In 1939, however, Colorado diverted more than that total amount. Apparently no question had been raised by Wyoming as to the diversions in 1937 and 1938. It is undisputed that when the diversions in 1939 reached 39,865.43 acre feet on June 19th, Colorado

closed the headgates of the various appropriations within that State. But Wyoming alleges that Colorado wrongfully permitted the headgates to be reopened on June 22d and to remain open until July 11th, thus permitting the diversion of 12,673 acre feet in excess of the aggregate amount allowed to Colorado, despite Wyoming's protest. That there was this excessive diversion is not controverted.

Colorado insists that Wyoming has not been injured. But such a defense is not admissible. After great consideration, this Court fixed the amount of water from the Laramie river and its tributaries to which Colorado was entitled. Colorado is bound by the decree not to permit a greater withdrawal and, if she does so, she violates the decree and is not entitled to raise any question as to injury to Wyoming when the latter insists upon her adjudicated rights. If nothing further were shown, it would be our duty to grant the petition of Wyoming and to adjudge Colorado in contempt for her violation of the decree.

But Colorado insists that the diversion of more than the allocated total during the season of 1939 was with Wyoming's acquiescence. That is the sole available defense. To support it, Colorado has presented affidavits showing communications between an association of meadowland appropriators and the special hydrographer of Wyoming and also stating that at a conference in the office of the Governor of Colorado on July 1, 1939, the officers of Wyoming said that they had no objection to continued diversions being made through the meadowland ditches for the reason that a great portion of the water so diverted returned to the Laramie river to be used downstream by Wyoming appropriators. Wyoming presents affidavits to the contrary, setting forth her demands. It is unnecessary to review in detail the points in controversy. In the light of all the circumstances, we think it sufficiently appears that there was a period of uncertainty and room for misunderstanding which may be considered in extenuation. In the future there will be no ground for any possible misapprehension based upon views of the effect of the meadowland diversions or otherwise with respect to the duty of Colorado to keep her total diversions from the Laramie river and its tributaries within the limit fixed by the decree.

For the reasons stated, the petition of Wyoming is denied, the costs to be equally divided.

It is so ordered.